

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

545

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,
Respondents

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 17 1970

THE WESTERN UNION TELEGRAPH COMPANY
Intervenor

Nathan J. Paulson
CLERK

On Petition for Review of an Order
of the Federal Communications Commission

APPENDIX

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RELEVANT DOCUMENT FILINGS
AND PROCEEDINGS

1969

- Nov. 13 Western Union Mailgram Briefing - filed.
- Nov. ____* Brochure on Mailgram Service, Explanatory Comments and Statements in Connection with Proposed Rates and Regulations - filed.
- Dec. 1 Letter from Bernard Jaffe, Director - Tariffs, Western Union Telegraph Company, dated November 28, 1969 to Secretary, FCC, bearing Transmittal No. 6411, and accompanying Tariff Materials on Mailgram Service - filed.
- Dec. 8 Letter from Joseph A. Beirne, President, Communications Workers of America to FCC, dated December 5, 1969 - filed.
- Dec. 18 Petition to Suspend, submitted by United Telegraph Workers, AFL-CIO - filed.
- Dec. 23 Letter from Joseph A. Beirne, President, Communications Workers of America to FCC, dated December 17, 1969 - filed.
- Dec. 29 Reply to United Telegraph Workers, AFL-CIO's Petition to Suspend, submitted by Western Union Telegraph Company - filed.

* Exact filing date does not appear in the FCC record.

Dec. 29 Responding Memorandum of United Telegraph
Workers, AFL-CIO, in Support of Petition to
Suspend - filed.

Dec. 31 Memorandum Opinion and Order of FCC - adopted.

1970

Jan. 2 Memorandum Opinion and Order of FCC - released.



COMMON CARRIER BUREAU

DEC 2 1969

BENJAMIN JAFFE
DIRECTOR - TARIFFS

DOMESTIC November 28, 1969
RATES DIVISION

Transmittal No. 6411

Secretary
Federal Communications Commission
Washington, D.C. 20554

Attention: Common Carrier Bureau

The accompanying tariff material, issued by The Western Union Telegraph Company is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. The filing consists of the following, effective January 1, 1970:

Tariff F.C.C. No. 256
Original Title Page
Original Pages 1-21

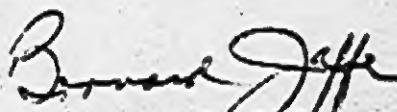
Tariff F.C.C. No. 240
174th Revised Page 1
6th " " 4A

Tariff F.C.C. No. 252
3rd Revised Page 1
1st " " 6

This filing is being made to establish regulations and rates applicable to a new service offering to be known as MAILGRAM Service between points within the continental United States. MAILGRAM Service is a new type of communications service which utilizes the Telegraph Company's Information Services Computer System and other service facilities in conjunction with the U.S. Post Office Department's mail facilities for the acceptance and delivery of communications normally on the following business day. This service which is being established for an experimental period of two years will be available from the Telegraph Company's Telex subscribers connected to Telex exchanges in 12 cities in the United States, also from INFO-COM subscriber locations in these cities, to any location in the contiguous 48 states.

The charge for a MAILGRAM is made up of a usage charge and a service charge. The usage charge will vary with message length and distance and the service charge will be either a flat \$.65 or \$.95 per message depending upon the city in which the MAILGRAM originates. The two MAILGRAM Service charges are necessary during the experimental period in order to permit the development of price-volume relationships.

A brochure providing a detailed description of the offering, the market test, the technological manner in which the service will be provided, and the supporting revenue requirement information has been furnished separately to the Commission's Staff.


Director - Tariffs

RECEIVED IN

DEC 2 1969

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TELEX SERVICECHECK SHEET

This tariff contains pages 1 to 41, inclusive, each of which is effective on the date shown thereon. Original and revised pages as named below and Supplements No. 1 and No. 2 contain all changes from the original tariff that are in effect on the date hereof:

<u>Page</u> <u>Title</u>	<u>Revision</u>	<u>Page</u>	<u>Revision</u>
	3	17A	14
1	174*	17B	16
2	20	17BA	1
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3A	Original	17CA	2
4	8	18	39
4A	6*	18A	26
5	9	18AA	5
5A	3	18B	14
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6A	7	19	31
6B	10	19A	14
7	28	19B	6
7A	5	19C	3
7AA	1	20	19
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7B	2	22	21
8	14	22A	12
8A	2	22B	5
9	8	23	8
9A	2	24	5
9B	2	25	10
9C	1	26	12
10	49	27	4
10A	29	28	3
10B	13	29	12
11	39	30	6
12	37	31	6
13	29	32	6
14	37	33	3
14A	7	34	5
15	38	35	6
15A	27	35A	1
15B	16	35B	1
15C	4	36	5
16	28	37	2
16A	15	38	2
16B	7	39	1
16C	4	40	1
17	26	41	3

*Issued November 28, 1969

Issued: November 28, 1969

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Effective: January 1, 1970

Issued by: Bernard Jaffe,
Director - Tariffs,

60 Hudson Street, New York, N.Y. 10013

TELEX SERVICE

4. REGULATIONS (Cont'd)4.1 Conditions of Operation: (Cont'd)

- (f) Telex Service is furnished subject to the conditions that it will not be used for unlawful purposes.
- (g) The subscriber is to provide the personnel, also power, stationery and other supplies required for operation of the Telex station equipment on his premises such as page rolls, teleprinter tape, perforator or reperforator tape, teleprinter ribbons, etc.
- (h) In the cities identified by the symbol Ø in 5.5(d) following, the facilities used in connection with Telex Service may be utilized for the local pickup and delivery of regular domestic and international telegraph messages between the subscriber's station and the Telegraph Company's serving Telex exchange office. Except in the case of Tel(T)ex Service as provided for in 6.9 following, no Telex usage charge is made against the Telex subscriber for the use of the facilities for this purpose.
- (i) Telex Service facilities may be used by Telex subscribers for filing international telegraph messages through the Telegraph Company's exchange office at Greensboro, No. Car., except that the Telex Service facilities may be used for filing international messages through the Telegraph Company's exchange office at Atlanta, Ga. in the case of messages routed via Tropical Radio Telegraph Company or through the exchange office at Newark, N.J. in the case of messages routed via French Cable Company. No Telex usage charge is made against the Telex subscriber for the use of the facilities for this purpose.
- (j) Telex subscribers connected to the following Telex exchanges may use their Telex station equipment for transmitting MAILGRAM Service messages through the Telegraph Company's computer system:

Atlanta, Ga.
Boston, Mass.
Charlotte, No. Car.
Cincinnati, Ohio
Dallas, Tex.
Denver, Colo.

Detroit, Mich.
Kansas City, Mo.
Miami, Fla.
Newark, N.J.
Seattle, Wash.
Washington, D.C.

No Telex pulse usage charge is made against Telex subscribers for use of the Telex facilities for this purpose.

- (*) - Expires with December 31, 1971 unless sooner cancelled, changed or extended.
- (S) - Originally effective December 31, 1969.

Issued: November 28, 1969

Effective: January 1, 1970

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Issued by: Bernard Jaffe,
Director - Tariffs,

INFO-COM SERVICE

CHECK SHEET

This tariff contains pages 1 to 31, inclusive, each of which is effective as of the date shown thereon. Original and revised pages as named below contain all changes from the original tariff in effect on the date hereof.

<u>Page</u> <u>Title</u>	<u>Revision</u>
1	1
4	3*
5	1
6	1*
16	1
16A	Original
17	1
20	1
21A	Original
22	1
23	Original
24	Original
25	1
26	1
27-31	Original

*Issued November 28, 1969

Issued: November 28, 1969

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Effective: January 1, 1970

Issued by: Bernard Jaffe,
Director - Tariffs,

INFO-COM SERVICE3. DEFINITION OF TERMS: (Cont'd)

Priority: Denotes that precedence in forwarding is to be accorded messages so designated.

Station: Denotes a location on a customer's or an authorized user's premises and the total complement of equipment used at that location to provide INFO-COM Service.

4. REGULATIONS:4.1 Use of Service:

(a) Service furnished under this tariff shall be used only for communications in which the customer has a direct interest, transmitted (i) from one INFO-COM station to another INFO-COM station in the same customer network, or (ii) between an INFO-COM station and the Telegraph Company's computer center for INFO-COM supplementary service purposes. An INFO-COM station in one customer network may not send communications to an INFO-COM station in another customer network. INFO-COM stations at the following cities may also be used for transmitting MAILGRAM Service messages.

Atlanta, Ga.
Boston, Mass.
Charlotte, N.C.
Cincinnati, Ohio

Dallas, Texas
Denver, Colo.
Detroit, Mich.
Kansas City, Mo.

Miami, Fla.
Newark, N.J.
Seattle, Wash.
Washington, D.C.

(T)

(T)

(N)(*)

(N)(*)

(b) INFO-COM Service shall not be used either directly or indirectly for the handling of communications, or for any other purpose, for the public or any person, firm or corporation other than the INFO-COM customer or authorized user; nor for the transmission to or from an international communications common carrier, of international messages destined to or received from overseas points.

(c) INFO-COM Service is furnished subject to the condition that it will not be used for unlawful purposes.

(d) The customer provides the personnel, power, stationery and other supplies required for operation of the INFO-COM station equipment on his premises such as paper, perforator tape and ribbons. Power at each customer's station must be left on 24 hours per day.

(e) The INFO-COM customer may not rearrange, disconnect, remove or attempt to repair any Telegraph Company equipment, except upon written consent of the Telegraph Company or in an emergency such as a fire or flood.

(f) No equipment, apparatus, circuit or device not furnished by the Telegraph Company shall be attached to or connected with the facilities furnished at an INFO-COM station, whether physically, by induction or otherwise provided in (g) following. In case any such unauthorized attachment or connection is made, the Telegraph Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

(*) Expires with December 31, 1971 unless sooner cancelled, changed or extended.

Issued: November 28, 1969

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Effective: January 1, 1970

Issued by: Bernard Jaffe,
Director - Tariffs,

60 Hudson Street, New York, N.Y. 10013

THE WESTERN UNION TELEGRAPH COMPANY
Director - Tariffs
60 Hudson Street, New York, N.Y. 10013
Issued: November 28, 1969

TARIFF P.C.C. No. 256
Original Title Page

Effective: January 1, 1970

MAILGRAM SERVICE

This tariff applies to interstate service between points within the continental United States.

Whenever used in this tariff, the term "United States" or "continental United States" does not include the states of Alaska and Hawaii unless specifically so indicated.

MAILGRAM Service is furnished by means of wire, radio or a combination hereof.

NOTE: Format, page construction and page numbering is under authority of Special Permission No. 5479 of the F.C.C.

This tariff expires with December 31, 1971 unless sooner cancelled, changed or extended.

THE WESTERN UNION TELEGRAPH COMPANY
By Bernard Jaffe, Director - Tariffs
60 Hudson Street, New York, N.Y. 10013
Issued: November 28, 1969

TARIFF F.C.C. No. 256
Original Page 1

Effective: January 1, 1970

MAILGRAM SERVICE

Check Sheet

Pages 1 to 21 inclusive of this tariff are effective as of the date shown thereon.

THE WESTERN UNION TELEGRAPH COMPANY
Director - Tariffs
60 Hudson Street, New York, N.Y. 10013
Issued: November 28, 1969

TARIFF F.C.C. No. 256
Original Page 2

Effective: January 1, 1970

MAILGRAM SERVICE

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THE WESTERN UNION TELEGRAPH COMPANY
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Issued: November 28, 1969

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Original Page 3

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MAILGRAM SERVICE

Explanation of Symbols

- (C) - to signify changed regulation.
- (D) - to signify discontinued rate or regulation.
- (I) - to signify increase.
- (N) - to signify new rate or regulation.
- (R) - to signify reduction.
- (S) - to signify reissued matter.
- (T) - to signify a change in text but no change in rate or regulation.

Reference to Other Tariffs

Whenever reference is made to other tariffs of this Company, the reference is to the tariffs in force as of the effective date of this tariff, and to amendments and reissues thereof.

Concurring, Connecting and Other Participating Carriers

None

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Effective: January 1, 1970

MAILGRAM SERVICE

1. Application of Tariff

- 1.1 This tariff contains the regulations and rates applicable to MAILGRAM Service between points within the continental United States.

2. Description of Service

- 2.1 MAILGRAM Service provides for the transmission of messages through the Telegraph Company's Information Services Computer System by a subscriber to the Telegraph Company's Telax or INFO-COM Service at a city listed in 2.2 to certain Serving Post Offices, as listed in 7., for mail delivery by the Post Office Department to addressees in the continental United States.
- 2.2 MAILGRAM Service is available from any Telex subscriber connected to a Telax exchange in one of the following cities, also from INFO-COM subscriber locations in these cities:

Atlanta, Ga.
Boston, Mass.
Charlotte, N.C.
Cincinnati, Ohio
Dallas, Texas
Denver, Colo.

Detroit, Mich.
Kansas City, Mo.
Miami, Fla.
Newark, N.J.
Seattle, Wash.
Washington, D.C.

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MAILGRAM SERVICE

2. Description of Service (Cont'd)

2.3 MAILGRAMS are accepted by the Telegraph Company during the hours 8:00 a.m. to 11:00 p.m., Eastern Time, Monday through Friday, except January 1, July 4, Labor Day, Thanksgiving Day and December 25 (also excluding Friday or Monday when any of these dates falls on a Saturday or Sunday and the holiday is observed on Friday or Monday).

3. Definitions

Answer-back - denotes the characters used to identify the Serving Post Office.

Class 1 INFO-COM Subscriber Location)

Class 2 INFO-COM Subscriber Location) - denotes the customer premises where the Telegraph Company has installed, for use in connection with the Telegraph Company's INFO-COM Service, sending teleprinter equipment which is capable of operating at speeds up to 100 words per minute.

Class 3 INFO-COM Subscriber Location - denotes the customer premises where the Telegraph Company has installed, for use in connection with the Telegraph Company's INFO-COM Service, sending teleprinter equipment which is capable of operating at speeds up to 66 words per minute.

Customer - denotes the person who, or the firm, company, or other organization which uses the MAILGRAM Service under this tariff and is responsible for payment of charges as well as compliance with the Telegraph Company's regulations covering such service.

INFO-COM Subscriber - denotes the person who, or the firm, company or other organization which uses INFO-COM Service under the Telegraph Company's Tariff F.C.C. No. 252.

MAILGRAM - denotes the message sent by a customer through the Telegraph Company's Information Services Computer System to a Serving Post Office for mail handling and delivery to the addressee.

Serving Post Office - denotes a post office in the United States to which a MAILGRAM may be sent for mail handling and delivery to the addressee.

THE WESTERN UNION TELEGRAPH COMPANY
Director - Tariffs
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MAILGRAM SERVICE

3. Definitions (Cont'd)

Routing Number - denotes the arabic numbers required to route the MAILGRAM to the Serving Post Office.

Telex Subscriber - denotes the person who, or the firm, company or other organization which uses Telex Service under the Telegraph Company's Tariff F.C.C. No. 240.

Telex Subscriber Location - denotes the customer premises where the Telegraph Company has installed, for use in connection with the Telegraph Company's Telex Service, sending teleprinter equipment which is capable of operating at speeds up to 66 words per minute.

4. Conditions of Operation

4.1 Customers may avail themselves of this service by:

4.1.1 Placing a call to the Telegraph Company's computer.

4.1.2 Transmitting the routing number and answer-back of the Serving Post Office through which the MAILGRAM is to be handled.

4.1.3 Addressing the MAILGRAM to show the proper Post Office Department zip code number in the postal address.

4.2 On a single connection to the computer, the customer may transmit a single MAILGRAM, a series of two or more MAILGRAMS or a multiple-address/common text MAILGRAM (a "book" of MAILGRAMS), subject to a maximum of 100 MAILGRAM units.

THE WESTERN UNION TELEGRAPH COMPANY
Director - Tariffs
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Issued: November 28, 1969

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MAILGRAM SERVICE

4. Conditions of Operation (Cont'd)

4.3 The customer, in transmitting the MAILGRAM, must use the following format, single line feed, and with no more than a total of four lines used for items (6), (7) and (8). The numbers in parentheses relate to the examples shown.

- (1) Start-of-message character sequence.
- (2) Sender's message number (use is optional).
- (3) Sending station's city and state.
- (4) Serving Post Office routing number.
- (5) Serving Post Office answer-back.
- (6) Name of addressee.
- (7) Number and street of addressee.
- (8) Destination city, state and Post Office zip code number of addressee.
- (9) Beginning-of-text character sequence.
- (10) Text.
- (11) Signature.
- (12) End-of-message character sequence.

Examples:

From a Telex or Class 3 INFO-COM
Subscriber Location:

ZCZC 002 KANSAS CITY MO
(1) (2) (3)

TLX 138629 MAILGRAM NWK
(4) (5)

JOHN JAMISON CO
(6)

125 BROAD ST
(7)

RIDGEWOOD NJ 07450
(8)

BT
(9)

SHIP ORDER XYZ BY FREIGHT
NO LATER THAN JANUARY 10.
(10)

HARRY ROE
(11)

NNNN
(12)

From a Class 1 or Class 2 INFO-COM
Subscriber Location:

(CONTROL/A) 1 KANSAS CITY MO
(1) (2) (3)

TLX 138629 MAILGRAM NWK
(4) (5)

JOHN JAMISON CO
(6)

125 BROAD ST
(7)

RIDGEWOOD NJ 07450
(8)

(CONTROL/B)
(9)

SHIP ORDER XYZ BY FREIGHT
NO LATER THAN JANUARY 10.
(10)

HARRY ROE
(11)

(CONTROL/C) (CONTROL/S)
(12)

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MAILGRAM SERVICE

4. Conditions of Operation (Cont'd)

4.4 Plain language, abbreviations, code, cipher, and word or character spacing may be used in the address, text and signature of MAILGRAMS in any combination permitted by the nature of the customer's station equipment except that the keyboard combinations "ZCZC," "NNNN" and "FICS D" may not be used.

5. Regulations

5.1 MAILGRAM Service is furnished subject to the condition that it will not be used for unlawful purposes.

5.2 Delivery

5.2.1 Delivery of MAILGRAMS is undertaken by the Post Office Department and that agency intends to effectuate delivery of MAILGRAMS the following Post Office business day after filing provided the MAILGRAM is accepted by the computer before 7:00 P.M., local time at the Serving Post Office, except that for MAILGRAMS sent to the following Serving Post Offices addressed with the zip code references shown, the acceptance time for delivery the following Post Office business day shall be the hours indicated below:

<u>When First 3 Digits of Post Office Zip Code Number Are:</u>	<u>Serving Post Office Is:</u>	<u>MAILGRAMS Must Be Accepted By Computer No Later Than:</u>
047	Portland, Maine	6 P.M. Eastern Time
592	Great Falls, Mont.	2 P.M. Mountain Time
638	St. Louis, Mo.	6 P.M. Central Time
769	Fort Worth, Texas	6 P.M. Central Time
797	Amarillo, Texas	6 P.M. Central Time

5.2.2 If a MAILGRAM cannot be delivered by the Post Office Department because of an incorrect or incomplete address, the customer will be notified of the non-delivery and the reason therefor. To provide such notice, the customer, by use of the MAILGRAM Service, authorizes the Telegraph Company to open such undelivered MAILGRAM for the purpose of identifying the customer. No charge will be made for the advice of non-delivery. If non-delivery is due to an incorrect or incomplete address and the sender desires to have delivery made to a correct address, the sender is required to transmit a new MAILGRAM at his expense.

5.2.3 If the MAILGRAM is received at the Serving Post Office with an improperly spaced address or a type of addressing which will preclude delivery by the Post Office Department, the sender will be notified and be requested to send a new MAILGRAM, in which case the service charge for the MAILGRAM as set forth in 6.2.2 will apply only for the new MAILGRAM.

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MAILGRAM SERVICE

5. Regulations (Cont'd)

5.3 Service Limitation

5.3.1 The Telegraph Company reserves the right to limit the length of communications or to discontinue service temporarily when necessary because of conditions beyond its control or the requirements of its regularly established message telegraph services.

5.3.2 Upon non-payment of any sum owing to the Telegraph Company for MAILGRAM Service for more than 60 days beyond the date of rendition of the bill for such service, or upon a violation of any of the conditions governing the furnishing of service under this tariff, or upon use of the Telegraph Company's facilities for the purpose of performing any service in competition with the services which the Telegraph Company or Post Office Department may now or hereafter furnish, the Telegraph Company may, without incurring any liability, forthwith discontinue the furnishing of facilities which make available the use of MAILGRAM Service.

5.4 Liability - In view of the fact that the customer controls the transmission of the MAILGRAM over the Telegraph Company's facilities, and because errors and interruptions incident to the service and to the use of such facilities are unavoidable, MAILGRAM Service furnished by the Telegraph Company is subject to the terms, conditions and limitations herein stated.

5.4.1 With respect to the transmission of the MAILGRAM from the customer's station to a Serving Post Office, the following conditions apply.

- (A) The liability of the Telegraph Company for damages arising out of mistakes, omissions, interruptions, delays or errors or defects in transmission occurring in the course of furnishing service or facilities under this tariff and not caused by the negligence of the customer, or of the Telegraph Company in failing to maintain proper standards of maintenance and operation and to exercise reasonable supervision, shall in no event exceed an amount equivalent to the charge to the customer for the time period during which such mistake, omission, interruption, delay or error or defect in transmission occurs.
- (B) The Telegraph company shall be indemnified and saved harmless by the customer initiating the MAILGRAM against all claims for libel, slander or the infringement of copyright arising from the material transmitted over the Telegraph Company's facilities; and against all other claims arising out of any act or omission of the customer or the addressee in connection with the use of the MAILGRAM Service.

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MAILGRAM SERVICE

5. Regulations (Cont'd)
5.4 Liability (Cont'd)

5.4.2 With respect to the local handling of the MAILGRAM at a Serving Post Office listed in 7. and its delivery by the Post Office Department in the destination city, the following conditions apply:

- (A) The Telegraph Company is solely responsible for the handling of the MAILGRAM at the Serving Post Office prior to its being sealed for mailing, but the Telegraph Company shall not be liable for mistakes or delays, whether caused by negligence or otherwise, beyond the actual loss, not exceeding in any event the sum of fifty dollars; nor shall the Telegraph Company be liable in any case for delays arising from unavoidable interruption in the working of its facilities.
- (B) No liability shall attach to the Telegraph Company for any act, omission or delay by the Post Office Department in the delivery, or non-delivery, of the MAILGRAM after it is sealed for mailing.
- (C) The Telegraph Company shall not be liable for damages or statutory penalties when the claim is not presented in writing to the Telegraph Company within ninety days after the MAILGRAM is accepted by the Telegraph Company's computer; provided, however, that this condition shall not apply to claims for damages or overcharges within the purview of Section 415 of the Communications Act of 1934, as amended.

THE WESTERN UNION TELEGRAPH COMPANY
Director - Tariffs
60 Hudson Street, New York, N.Y. 10013
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TARIFF F.C.C. No. 256
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Effective: January 1, 1970

MAILGRAM SERVICE

6. Rates

6.1 For rating purposes, the continental United States is divided into 12 rate areas as follows:

<u>Rate Area</u>	<u>Includes Serving Post Offices in:</u>
1...	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia.
2...	Florida, Georgia, North Carolina and South Carolina.
3....	Illinois, Indiana, Kentucky, Michigan (except Iron Mountain) and Ohio.
4...	Alabama, Arkansas, Louisiana, Mississippi and Tennessee.
5...	Minnesota, North Dakota, South Dakota, Wisconsin and Michigan (Iron Mountain only).
6...	Iowa, Kansas, Missouri and Nebraska.
7...	Oklahoma and Texas.
8...	Montana and Wyoming.
9...	Colorado and Utah.
10...	Arizona and New Mexico.
11...	Idaho, Oregon and Washington.
12...	California and Nevada.

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6. Rates (Cont'd)

6.2 The total charge for a MAILGRAM is made up of two basic elements, a usage charge and a service charge, determined as follows:

6.2.1 The usage charge is determined in accordance with sub-paragraphs (A) and (B) following, except that for a MAILGRAM from an INFO-COM subscriber, the usage charges set forth in Western Union Tariff F.C.C. No. 252, Paragraph 5.2, apply in addition.

(A) For a MAILGRAM sent from a Telex subscriber location, the usage charge is determined by ascertaining the rate areas in which the sending Telex subscriber and the Serving Post Office are located and obtaining the applicable amount from the table below.

Table of Usage Rates
 (Rates shown in cents for each 1/10 minute)

Between Rate Area	And Rate Area:											
	1											
1	1.75	2										
2	3.00	1.75	3									
3	3.00	3.00	1.75	4								
4	4.50	3.00	3.00	1.75	5							
5	4.50	4.50	3.00	4.50	1.75	6						
6	4.50	4.50	3.00	3.00	3.00	1.75	7					
7	4.50	4.50	4.50	3.00	4.50	3.00	1.75	8				
8	6.00	6.00	4.50	4.50	3.00	3.00	4.50	1.75	9			
9	6.00	6.00	4.50	4.50	3.00	3.00	3.00	3.00	1.75	10		
10	6.00	6.00	4.50	4.50	4.50	4.50	3.00	4.50	3.00	1.75	11	
11	6.00	6.00	6.00	6.00	4.50	4.50	4.50	3.00	3.00	4.50	1.75	12
12	6.00	6.00	6.00	6.00	4.50	4.50	4.50	3.00	3.00	3.00	3.00	1.75

(B) For a MAILGRAM sent from an INFO-COM subscriber location, the following charges apply:

(1) From a Class 3 INFO-COM subscriber location, the usage charge is determined by ascertaining the rate area of the Serving Post Office and the rate area of the subscriber location on the subscriber's INFO-COM network which produces the lowest charge, and obtaining the applicable amount from the table in (A) preceding.

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6. Rates (Cont'd)

6.2 (Cont'd)

6.2.1 (Cont'd)

(B) (Cont'd)

- (2) From a Class 1 or Class 2 INFO-COM subscriber location, the usage charge is determined by ascertaining the rate area of the Serving Post Office and the rate area of the subscriber location on the subscriber's INFO-COM network which produces the lowest charge, and obtaining the applicable amount from the following table:

Table of Usage Rates
 (Rates shown in cents for each 1/10 minute)

Between
 Rate
 Area

and Rate Area:

	1	2	3	4	5	6	7	8	9	10	11	12
1	2.65											
2	4.50	2.65										
3	4.50	4.50	2.65									
4	6.75	4.50	4.50	2.65								
5	6.75	6.75	4.50	6.75	2.65							
6	6.75	6.75	4.50	4.50	4.50	2.65						
7	6.75	6.75	6.75	4.50	6.75	4.50	2.65					
8	9.00	9.00	6.75	6.75	4.50	4.50	6.75	2.65				
9	9.00	9.00	6.75	6.75	4.50	4.50	4.50	4.50	2.65			
10	9.00	9.00	6.75	6.75	6.75	6.75	4.50	6.75	4.50	2.65		
11	9.00	9.00	9.00	9.00	6.75	6.75	6.75	4.50	4.50	6.75	2.65	
12	9.00	9.00	9.00	9.00	6.75	6.75	6.75	4.50	4.50	4.50	4.50	2.65

- 6.2.2 The service charge for each MAILGRAM transmitted to the Serving Post Office listed in 7. for delivery by the Post Office Department is as follows:

- (A) \$.95 for each MAILGRAM originating at a subscriber location in the cities of:

Charlotte, N.C.
 Newark, N.J.

Detroit, Mich.
 Miami, Fla.

Seattle, Wash.
 Washington, D.C.

- (B) \$.65 for each MAILGRAM originating at a subscriber location in the cities of:

Atlanta, Ga.
 Boston, Mass.

Cincinnati, Ohio
 Dallas, Tex.

Denver, Col.
 Kansas City, Mo.

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MAILGRAM SERVICE

7. List of Zip Code References and Associated Serving Post Offices, Routing Numbers and Answer-backs

State to Which MAILGRAM is Destined	Where First 3 Digits of Post Office Zip Code Number are	Serving Post Office is	Routing Number	Answer-back
Alabama	350 - 359	Birmingham, Ala.	59883	MAILGRAM BHM
	360 - 361	Montgomery, Ala.	593446	" MGY
	362	Birmingham, Ala.	59883	" BHM
	363 - 364	Montgomery, Ala.	593346	" MGY
	365 - 366	Mobile, Ala.	505444	" MBL
	367 - 368	Montgomery, Ala.	593346	" MGY
	369	Jackson, Miss.	585480	" JKS
Arizona	850 - 865	Phoenix, Ariz.	668480	" PHX
Arkansas	716 - 729	Little Rock, Ark.	536487	" LRK
California	900 - 937	Los Angeles, Cal.	673541	" LSA
	939 - 944	San Francisco, Cal.	340911	" SFO
	945 - 948	Oakland, Cal.	336380	" OAK
	949 - 951	San Francisco, Cal.	340911	" SFO
	952 - 953	Sacramento, Cal.	377347	" SAC
	954 - 955	San Francisco, Cal.	340911	" SFO
	956 - 960	Sacramento, Cal.	377347	" SAC
	961	Reno, Nev.	354440	" RNO
Colorado	800 - 816	Denver, Colo.	045878	" DVR
Connecticut	060 - 069	New Haven, Conn.	963467	" NVN
Delaware	197 - 199	Wilmington, Del.	835409	" WIL
District of Columbia	200 - 205	Washington, D.C.	892764	" WSH
Florida	320 - 322	Orlando, Fla.	564337	" ORL
	323 - 325	Tallahassee, Fla.	548441	" TAS
	326 - 329	Orlando, Fla.	564337	" ORL
	330 - 334	Miami, Fla.	512427	" MIA
	335 - 338	Orlando, Fla.	564337	" ORL
	339	Miami, Fla.	512427	" MIA
Georgia	300 - 303	Atlanta, Ga.	542325	" ATL
	304	Macon, Ga.	544435	" MCN
	305 - 307	Atlanta, Ga.	542325	" ATL
	308 - 312	Macon, Ga.	544435	" MCN
	313 - 314	Savannah, Ga.	546480	" SAV
	315 - 319	Macon, Ga.	544435	" MCN

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MAILGRAM SERVICE

7. List of Zip Code References and Associated Serving Post Offices, Routing Numbers and Answer-backs (Cont'd)

<u>State to Which MAILGRAM is Destined</u>	<u>Where First 3 Digits of Post Office Zip Code Number are</u>	<u>Serving Post Office is</u>	<u>Routing Number</u>	<u>Answer-back</u>
Idaho	832 - 834	Pocatello, Ida.	368456	MAILGRAM POCA
	835	Spokane, Wash.	326421	" SPK
	836 - 837	Boise, Ida.	368445	" BSE
	838	Spokane, Wash.	326421	" SPK
Illinois	600 - 603	Chicago, Ill.	254366	" B CGO
	604 - 605	Chicago, Ill.	254498	" C CGO
	606	Chicago, Ill.	253661	" A CGO
	609	Chicago, Ill.	254498	" C CGO
	610 - 611	Chicago, Ill.	254366	" B CGO
	612	Chicago, Ill.	253661	" A CCO
	613	Chicago, Ill.	254498	" C CGO
	614	Chicago, Ill.	253661	" A CGO
	615 - 619	Springfield, Ill.	406437	" SGF
	620 - 622	St. Louis, Mo.	442350	" STL
	623 - 629	Springfield, Ill.	406437	" SGF
Indiana	460 - 469	Indianapolis, Ind.	272168	" IND
	470	Columbus, Ohio	245364	" COL
	471	Louisville, Ky.	204142	" LVL
	472 - 479	Indianapolis, Ind.	272168	" IND
Iowa	500 - 505	Des Moines, Ia.	478405	" DMS
	506 - 507	Cedar Rapids, Ia.	464428	" CDR
	508	Des Moines, Ia.	478405	" DMS
	510 - 515	Sioux City, Ia.	48524	" SOU
	516	Des Moines, Ia.	478405	" DMS
	520 - 524	Cedar Rapids, Ia.	464428	" CDR
	525	Des Moines, Ia.	478405	" DMS
Kansas	526 - 528	Cedar Rapids, Ia.	464428	" CDR
	660 - 668	Kansas City, Kan.	42602	" KSCK
	669 - 675	Wichita, Kan.	417325	" WIC
	676 - 678	Hays, Kan.	42603	" HAYS
	679	Wichita, Kan.	417325	" WIC

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7. List of Zip Code References and Associated Serving Post Offices, Routing Numbers and Answer-backs (Cont'd)

<u>State to Which MAILGRAM is Destined</u>	<u>Where First 3 Digits of Post Office Zip Code Number are</u>	<u>Serving Post Office is</u>	<u>Routing Number</u>	<u>Answer-back</u>
Kentucky	400 - 402	Louisville, Ky.	204142	MAILGRAM LVL
	403 - 409	Lexington, Ky.	218458	" LEX
	410	Columbus, Ohio	245364	" COL
	411 - 418	Lexington, Ky.	218458	" LEX
	420 - 423	Louisville, Ky.	204142	" LVL
	424	Indianapolis, Ind.	272168	" IND
	425 - 427	Louisville, Ky.	204142	" LVL
Louisiana	700 - 704	New Orleans, La.	584231	" NLN
	705 - 714	Alexandria, La.	584291	" ALXA
Maine	039 - 046	Portland, Me.	944495	" POR
	047	Portland, Me.	944495	" POR
	048 - 049	Portland, Me.	944495	" POR
Maryland	206	Baltimore, Md.	87691	" BAL
	207 - 209	Washington, D.C.	892764	" WSH
	210 - 214	Baltimore, Md.	87691	" BAL
	215	Washington, D.C.	892764	" WSH
	216 - 219	Baltimore, Md.	87691	" BAL
Massachusetts	010 - 016	Springfield, Mass.	955491	" SPM
	017 - 026	Boston, Mass.	940141	" BSN
	027	Providence, R.I.	927571	" PVD
Michigan	480 - 482	Detroit, Mich.	233461	" DET
	484 - 491	Lansing, Mich.	229451	" LSG
	492	Detroit, Mich.	233461	" DET
	493 - 496	Lansing, Mich.	229451	" LSG
	497	Detroit, Mich.	233461	" DET
	498 - 499	Iron Mountain, Mich.	263444	" IRNO
Minnesota	550 - 558	Minneapolis, Minn.	290166	" MPS
	559 - 561	Mankato, Minn.	290337	" MAKO
	562 - 563	Minneapolis, Minn.	290166	" MPS
	564 - 567	Brainerd, Minn.	290336	" BRAI

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7. List of Zip Code References and Associated Serving Post Offices, Routing Numbers and Answer-backs (Cont'd)

State to Which MAILGRAM is Destined	Where First 3 Digits of Post Office Zip Code Number are	Serving Post Office is	Routing Number	Answer-back
Mississippi	386	Memphis, Tenn.	533156	MAILGRAM MFS
	387	Jackson, Miss.	585480	" JKS
	388	Memphis, Tenn.	533156	" MFS
	389 - 397	Jackson, Miss.	585480	" JKS
Missouri	630 - 634	St. Louis, Mo.	442350	" STL
	635	Kansas City, Mo.	42601	" KSC
	636 - 637	St. Louis, Mo.	442350	" STL
	638	St. Louis, Mo.	442350	" STL
	639	St. Louis, Mo.	442350	" STL
	640 - 648	Kansas City, Mo.	42601	" KSC
	650 - 652	St. Louis, Mo.	442350	" STL
	653	Kansas City, Mo.	42601	" KSC
	654 - 655	St. Louis, Mo.	442350	" STL
656 - 658	Kansas City, Mo.	42601	" KSC	
Montana	590 - 591	Billings, Mont.	319433	" BIL
	592	Great Falls, Mont.	318421	" GRF
	593	Billings, Mont.	319433	" BIL
	594 - 599	Great Falls, Mont.	318421	" GRF
Nebraska	680 - 689	Omaha, Neb.	48521	" OMA
	690 - 692	North Platte, Neb.	48527	" NPLA
	693	Alliance, Neb.	48529	" ALLE
Nevada	890 - 891	Las Vegas, Nev.	684473	" LSV
	893	Salt Lake City, Utah	388452	" SLC
	894 - 898	Reno, Nev.	354440	" RNO
New Hampshire	030 - 034	Concord, N.H.	943451	" COND
	035 - 037	White River Jct., Vt.	940138	" WHRJ
	038	Concord, N.H.	943451	" COND
New Jersey	070 - 079	Newark, N.J.	138629	" NWK
	080 - 087	Camden, N.J.	834242	" CM DN
	088 - 089	Newark, N.J.	138629	" NWK
New Mexico	870 - 884	Albuquerque, N.M.	660471	" ABQ

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State to Which MAILGRAM is Destined	Where First 3 Digits of Post Office Zip Code Number are*	Serving Post Office is	Routing Number	Answer-back
New York	10001	New York, N.Y.	125648	MAILGRAM A NYK
	10002	New York, N.Y.	127712	" C NYK
	10003	New York, N.Y.	125806	" B NYK
	10004 - 10008	New York, N.Y.	127712	" C NYK
	10009 - 10010	New York, N.Y.	125806	" B NYK
	10011	New York, N.Y.	125648	" A NYK
	10012 - 10015	New York, N.Y.	127712	" C NYK
	10016 - 10017	New York, N.Y.	125806	" B NYK
	10018 - 10020	New York, N.Y.	125648	" A NYK
	10021 - 10022	New York, N.Y.	125806	" B NYK
	10023 - 10027	New York, N.Y.	125648	" A NYK
	10028 - 10029	New York, N.Y.	125806	" B NYK
	10030 - 10034	New York, N.Y.	125648	" A NYK
	10035	New York, N.Y.	125806	" B NYK
	10036	New York, N.Y.	125648	" A NYK
	10037	New York, N.Y.	125806	" B NYK
	10038	New York, N.Y.	127712	" C NYK
	10039 - 10040	New York, N.Y.	125648	" A NYK
	10045 - 10046	New York, N.Y.	127712	" C NYK
	10049	New York, N.Y.	127712	" C NYK
	103 - 119	New York, N.Y.	125648	" A NYK
	120 - 126	Albany, N.Y.	145471	" ALB
	127	New York, N.Y.	125648	" A NYK
	128 - 129	Albany, N.Y.	145471	" ALB
	130 - 136	Syracuse, N.Y.	937327	" SYR
	137 - 139	Binghamton, N.Y.	933452	" BGM
	140 - 147	Buffalo, N.Y.	916490	" BUF
	148 - 149	Binghamton, N.Y.	933452	" BGM
North Carolina	270 - 277	Greensboro, N.C.	574402	" GBO
	278 - 279	Rocky Mount, N.C.	579400	" RYMO
	280 - 282	Charlotte, N.C.	572461	" CHA
	283 - 284	Greensboro, N.C.	574402	" GBO
	285	Rocky Mount, N.C.	579402	" RYMO
	286 - 288	Charlotte, N.C.	572461	" CHA
	289	Atlanta, Ga.	542325	" ATL
North Dakota	580 - 582	Fargo, N.D.	290338	" FGO
	583 - 586	Jamestown, N.D.	290339	" JATN
	587 - 588	Fargo, N.D.	290338	" FGO

* Where the first three digits of a Post Office Zip Code number are 100, the entire 5-digit Zip Code number is shown.

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<u>State to Which MAILGRAM is Destined</u>	<u>Where First 3 Digits of Post Office Zip Code Number are</u>	<u>Serving Post Office is</u>	<u>Routing Number</u>	<u>Answer-back</u>
Ohio	430 - 433	Columbus, Ohio	245364	MAILGRAM COL
	434 - 436	Cleveland, Ohio	980210	" CLV
	437 - 439	Columbus, Ohio	245364	" COL
	440 - 447	Cleveland, Ohio	980210	" CLV
	448 - 458	Columbus, Ohio	245364	" COL
Oklahoma	730 - 738	Oklahoma City, Okla.	71461	" OKC
	739	Wichita, Kan.	417325	" WIC
	740 - 744	Tulsa, Okla.	497465	" TUL
	745 - 749	Oklahoma City, Okla.	71461	" OKC
Oregon	970 - 973	Portland, Ore.	360233	" PTL
	974 - 977	Eugene, Ore.	364448	" EUG
	978	Pasco, Wash.	360280	" PSW
	979	Boise, Ida.	368445	" BSE
Pennsylvania	150 - 167	Pittsburgh, Pa.	812315	" PGH
	168 - 179	Harrisburg, Pa.	842395	" HBG
	180 - 181	Philadelphia, Pa.	834784	" PHA
	182	Harrisburg, Pa.	842395	" HBG
	183 - 188	Scranton, Pa.	837428	" SCR
	189 - 194	Philadelphia, Pa.	834784	" PHA
	195 - 196	Harrisburg, Pa.	842395	" HBG
Rhode Island	028 - 029	Providence, R.I.	927571	" PVD
South Carolina	290 - 296	Columbia, S.C.	573485	" CLB
	297	Charlotte, N.C.	572461	" CHA
	298	Columbia, S.C.	573485	" CLB
	299	Savannah, Ga.	546480	" SAV
South Dakota	570 - 573	Sioux Falls, S.D.	290267	" SFL
	574 - 576	Pierre, S.D.	290265	" PIRE
	577	Rapid City, S.D.	290266	" RACI
Tennessee	370 - 372	Nashville, Tenn.	554307	" NAS
	373 - 379	Knoxville, Tenn.	557400	" KXV
	380 - 383	Memphis, Tenn.	533156	" MFS
	384 - 385	Nashville, Tenn.	554307	" NAS

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<u>State to Which MAILGRAM is Destined</u>	<u>Where First 3 Digits of Post Office Zip Code Number are</u>	<u>Serving Post Office is</u>	<u>Routing Number</u>	<u>Answer-back</u>
Texas	750 - 759	Dallas, Tex.	730504	MAILGRAM DAL
	760 - 761	Fort Worth, Tex.	758385	" FTW
	762 - 763	Dallas, Tex.	730504	" DAL
	764	Fort Worth, Tex.	758385	" FTW
	765 - 768	Dallas, Tex.	730504	" DAL
	769	Fort Worth, Tex.	758385	" FTW
	770 - 778	Houston, Tex.	762111	" HOU
	779 - 788	San Antonio, Tex.	767334	" SNT
	789	Houston, Tex.	762111	" HOU
	790 - 791	Amarillo, Tex.	738448	" AMA
	792	Dallas, Tex.	730504	" DAL
	793 - 794	Amarillo, Tex.	738443	" AMA
	795 - 796	Fort Worth, Tex.	758385	" FTW
	797	Amarillo, Tex.	738443	" AMA
	798 - 799	El Paso, Tex.	749495	" ELP
Utah	840 - 847	Salt Lake City, Utah	388452	" SLC
Vermont	050 - 059	White River Jct., Vt.	940138	" WHRJ
Virginia	220 - 225	Falls Church, Va.	892761	" FSCH
	226 - 229	Washington, D.C.	892764	" WSH
	230 - 239	Richmond, Va.	827432	" RCH
	240 - 243	Roanoke, Va.	829467	" ROA
	244	Washington, D.C.	892764	" WSH
	245 - 246	Roanoke, Va.	829467	" ROA
Washington	980 - 982	Seattle, Wash.	320270	" SEA
	983 - 985	Tacoma, Wash.	327459	" TAC
	986	Portland, Ore.	360233	" PTL
	988 - 989	Pasco, Wash.	360280	" PSW
	990 - 992	Spokane, Wash.	326421	" SPK
	993	Pasco, Wash.	360280	" PSW
	994	Spokane, Wash.	326421	" SPK

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<u>State to Which MAILGRAM is Destined</u>	<u>Where First 3 Digits of Post Office Zip Code Number are</u>	<u>Serving Post Office is</u>	<u>Routing Number</u>	<u>Answer-back</u>
West Virginia	247 - 253	Charleston, W.Va.	885450	MAILGRAM CHW
	254	Washington, D.C.	892764	" WSH
	255 - 262	Charleston, W.Va.	885450	" CHW
	263 - 265	Clarksburg, W.Va.	869458	" CLG
	266	Charleston, W.Va.	885450	" CHW
	267 - 268	Washington, D.C.	892764	" WSH
Wisconsin	530 - 534	Milwaukee, Wisc.	269491	" MIL
	535 - 539	Portage, Wisc.	269404	" PTGE
	540	Minneapolis, Minn.	290166	" MPS
	541 - 543	Milwaukee, Wisc.	269491	" MIL
	544 - 546	Portage, Wisc.	269404	" PTGE
	547 - 548	Minneapolis, Minn.	290166	" MPS
Wyoming	820	Cheyenne, Wyo.	319439	" CHEY
	822 - 831	Cheyenne, Wyo.	319439	" CHEY

J. A. BEIRNE, President



Workers of America

(AFFILIATED WITH AFL-CIO)

1925 K STREET, N.W.

WASHINGTON 6, D.C.

TELEPHONE: Federal 7-7711

December 17, 1969

File: 1.12.1.483
x 3.1

Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20006

Attention: Common Carrier Bureau

Gentlemen:

This organization urges the Commission to make extensive studies of the proposed "Mailgram" service, which is to combine certain services of the Western Union Telegraph Co. and the Post Office Department.

In my letter of December 5, I indicated that a set of objections might be forthcoming. The information now on hand in my office points to numerous areas which need be examined before the proposed service becomes a final reality.

The prime objection foreseen by this organization is that the Post Office Department could take on a clouded status: Will it become a common carrier? Or an agent of a common carrier? Or a "hybrid" common carrier entity?

Officials of the Post Office Department have acknowledged that legislative authority would be necessary for the Department to undertake "Mailgram" service on a permanent basis, i.e., after the one-year experimental period (1970-71). The purpose of such legislation would, without doubt, be to clarify the status of the Department in the new service, and to provide authority for the Department to engage a private company to engage in a revenue-producing enterprise the bulk of whose benefits will accrue to the Company. It is logical to expect that the definition of the concept of "common carrier" must be examined and probably widened in the legislative process.

-2-

The definition of "common carrier," in Section 3(h) of the Communications Act of 1934, as amended, does not include the Post Office Department or other agency of the Federal Government. The second proviso in Section 201 (b) recognizes the future possibility that arrangements may be needed between carriers and allows the Commission to sanction such arrangements. This proviso would not "prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act,..."

If the Department will require legislative authority to engage in "Mailgram" service after the 2-year trial period, because of the public-private revenue interface, it is logical to believe that clarifying legislation would be needed during the 2-year trial period. There are at least two reasons: (1) Regular common carrier traffic will be generated; (2) Regular common carrier revenues will be collected.

This organization is constrained to question whether the 25¢ per-"Mailgram" fee to be paid to the Post Office Department will be sufficient to cover the actual costs to the Government. Ten cents will be for the equivalent of air mail postage, to assure priority of handling of the message; the other 15¢ is to cover the other tangible and intangible costs of the local Post Office in which the message is received.

Duties of postal personnel assigned to service the Western Union machines in the local Post Offices include replacement of paper rolls and ribbons; removal of messages; editing of such messages for accuracy; and assisting Western Union in cases of service breakdown and illegible messages. It is conceivable that each local Post Office will be in the position of diverting personnel from the regular job of handling the U.S. mail to the "Mailgram" printer. Due to budget stringencies, the Post Office Department is perennially short of personnel. The postal deficit can only be increased each year, if Post Offices are required to add staff due to "Mailgram."

Under the present postal laws, personnel in Post Offices are not allowed to read the mail; personnel found reading messages Even on postal cards are subject to disciplinary action. However, in the "Mailgram" service, the personnel in receiving Post Offices will be required to read and edit messages, to assure that each message is not garbled in transmission. The teleprinter machines to be installed in each Post Office will use "2-ply" paper, i.e., for original and carbon copy. The original of each message is placed in an envelope and sent through the mail to the addressee. The carbon copy is to be returned to Western Union for servicing and billing. Unless positive steps are taken to destroy it, the carbon paper lying between the original and duplicate of each message will be subject to reading by unauthorized persons, thereby violating the privacy of the communication.

If "Mailgram" generates sufficient message traffic as to allow continuation after the 2-year trial period, the Company's Public Message Service could be adversely affected. A brochure filed with the Commission to describe the operation of "Mailgram" service handles the matter very delicately:

"The Company anticipates the Mailgram service may have a derogating effect on the volumes of Overnight Telegrams, Overnight TCCS-MS and Tel(T)ex Service. On the other hand, to the extent that diversion does occur, it is anticipated that the Company will be able to effectuate cost savings. During the experimental period, the Company will analyze both the diversion and cost savings that might accrue as a result of any diversion."

The term "diversion" could be translated several ways: layoff or displacement of workers, due to reduced volume of message traffic into receiving offices, and drastic curtailment or outright abandonment of the present Public Message Service. This latter effect could take the form of having PMS available only to senders in cities on the Telex or Info-Com networks; such messages then would be delivered by the Post Office.

The Company's intentions as to the future of the Public Message Service are certainly germane for Commission consideration in its analysis of the "Mailgram" (Tariff FCC No. 256) filing. Inasmuch as the Commission currently has in progress actions in three dockets dealing with Western Union Telegraph Co. (Docket Nos. 17554, 18270 and 18593), good purpose might be served in widening the scope of the inquiries to include the questions raised by the "Mailgram" service.

This Union is the collective bargaining agent for only a small number of employees of Western Union, all of them in the New York City area. There would seem to be minimal effect on their employment, were "Mailgram" to become a permanent fixture in United States communications services. However, this organization's main concern is that a full range of communications services must continue to be publicly available to all, at reasonable tariffs. We do not, in short, wish to see Public Message Service consigned to the fate of the railroad passenger train.

Sincerely yours,

Joseph A. Beirne
President

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

THE WESTERN UNION TELEGRAPH COMPANY
PROPOSAL FOR NEW TYPE OF SERVICE TO
BE KNOWN AS MAILGRAM SERVICE

Tariff Material
Transmittal No. 6411

* * * * *

PETITION TO SUSPEND

The United Telegraph Workers, AFL-CIO ("Union") hereby respectfully requests that the Commission suspend The Western Union Telegraph Company's Tariff Material Transmittal No. 6411, proposing a new type of service to be known as the Mailgram Service. The Union represents approximately 22,000 Western Union employees in the continental United States (all the employees except for a bargaining unit of approximately 3,000 in New York City) and has an obvious and profound interest in the status and viability of the private telegraph industry, including public message service, in this country. That industry would be fundamentally changed, and the public telegram message service impaired and jeopardized, if the Commission permits this proposal to go into effect.

This Petition to Suspend is based upon the unlawfulness of this Company proposal which (1) is not a routine tariff amendment within the jurisdiction of the Commission to grant but a fundamental and radical change in national telecommunications policy, which

should be addressed to and can only be granted by the Congress, (2) is contrary to the public interest in viable and efficient telegraph communication, and (3) requires unauthorized action by the Post Office Department.

The unprecedented characteristics of the proposed Mailgram System are that telegraph messages will be transmitted to a Post Office rather than a Company or customer receiver; and telegram messages will be relayed by a Post Office employee who will take the message from the receiving apparatus, stuff it into an envelope, seal, stamp, and address the envelope, and then send it first class mail to be finally delivered by a Post Office employee rather than by a Western Union employee in the traditional manner of telegram delivery. While this initial request is for an "experimental" period of two years and is limited to particular cities and to Telex and INFO-COM subscribers, the fundamental issue at stake is whether a system with these distinctive characteristics is to be deemed just, fair, reasonable or lawful. That issue is no different in this request than it would be if the Company's initial request were directly and candidly permanent and unlimited. Certainly the Company intends ultimately to make Mailgram Service available on an unlimited and permanent basis if it believes this "experiment" economically successful and if the Commission now sanctions Post Office delivery of telegrams.

I. THIS COMMISSION LACKS POWER TO SANCTION SUCH A RADICAL CHANGE AS THE COMPANY PROPOSES IN THE NATIONAL TELECOMMUNICATIONS POLICY AS HISTORICALLY ESTABLISHED BY THE CONGRESS; THIS PROPOSAL IS PROPERLY ADDRESSED ONLY TO THE CONGRESS, NOT TO THIS COMMISSION.

This filing by Western Union, ostensibly for amendment of existing telegraph regulations and rates, is admittedly a proposal for "a new type of communications service which utilizes the Telegraph Company's Information Services Computer System and other service facilities in conjunction with the U. S. Post Office Department's mail facilities for the acceptance and delivery of communications normally on the following business day" (Company Transmittal No. 6411; letter of November 28, 1969) (emphasis added throughout this Petition). This is a radical proposal for the operational inter-relationship of the private Telegraphic Company and the Post Office, a proposal which has been made repeatedly in the course of American history, but always in full and open recognition of the fact that it raised fundamental issues of national telecommunications policy which could be resolved only by the Congress. Always the proposal has been introduced through the front door of a Congressional proposal subject to public consideration and debate. Never before has there been an effort to admit this change in established national communications policy through the back door by means of a tariff application which the Company evidently hoped would quietly and automatically go into effect. Never before has it been assumed that there was any existing legal authority, without specific legislation

by the Congress, for the Postmaster General to participate in the operation of the telegraph industry and to assume responsibility for the delivery or any other aspect of the transmission of telegrams from sender to addressee.

This Commission is in reality being asked to assume Congressional powers. It is being asked sub silentio to amend and expand the mates and bounds which Congress placed on its authority. It is being asked to disregard or overrule the carefully considered Congressional view of national communications policy segregating the private telegraph industry from the Post Office Department, to ignore the fact that Congress has deliberately rejected proposal after proposal for public participation in the telegraph industry, whether by public ownership or by the involvement of the Post Office in private telegraph operations, including Post Office delivery of telegrams. The tariff must be rejected, for by impressing on this proposal its stamp of legitimacy the Commission will be usurping a function and prerogative of establishing basic national telecommunications policy which, since the very invention of the telegraph over 130 years ago has been consistently understood as being the prerogative of Congress alone.

The pertinent history is most extensive and only a summary can be here assayed. The very first telegraph line built by Samuel F. B. Morse was owned by the Government and operated by the Post Office Department from 1844 to 1847.^{1/} The line was then sold to

1. Government Ownership of Electric Means of Communication, Sen. Doc. 399, 63rd Cong., 2nd Sess. (App. A, pp. 15 et seq., "Historical Resume Of Agitation For Government Ownership Of The Telegraph and Telephone of the United States") 7, 15 (1914) (hereinafter cited as "1914 Sen. Doc."); Herring and Gross,

private interests, and there was wilicat private expansion without pertinent legislation until 1866.^{2/} In that year, Congress enacted legislation granting various rights and incentives to private telegraph companies but providing that at any time after five years from the date of the enactment, the United States might purchase all the telegraph lines and property at a duly appraised valuation "for postal, military, or other purposes."^{3/} During and after the five-year period, there was much public debate as to what was the proper role of Government, which invariably meant the Post Office Department, in relation to the telegraph. There were two different types of proposals.^{4/} One was for outright purchase and operation by the Post Office Department. The other, the so-called Hubbard proposal, would have created a new private corporation to acquire all domestic telegraph lines and operate them by contractual relationships with the Post Office Department. That proposal included the selfsame concept of Post Office mail delivery of telegrams which is presented by the proposed tariff now before the Commission. There were many Bills, hearings and reports supporting one proposal or the other; but neither was adopted. Private companies, chiefly Western Union,

(continued from p. 4)
Telecommunications, (McGraw-Hill 1936). The cited "Historical Resume" is the best we have found for present purposes and the Commission is respectfully referred thereto for the details we have excluded from the text hereof in the interests of brevity.
p.1.

2. 1914 Sen. Doc. 7, 20.

3. Sec. 3, Act of July 24, 1866, 14 Stat. 221, set out at 1914 Sen. Doc. 20.

4. Wells, The Relation Of The Government To The Telegraph (1873) includes a discussion of these proposals.

continued to operate the telegraph for their own interests strictly apart and independent from the Post Office.

In 1914, when the Postmaster General responded to a Senate Resolution with a report favoring public ownership of electronic communications (including the telephone as well as the telegraph), he set out the history and declared that Government ownership had had "the indorsement of nearly every Postmaster General since the Civil War, with a score of favorable reports by committees of Congress, and by the example of practically every other nation of the civilized world. More than 70 bills have been introduced in Congress to accomplish it."^{5/} There was support also for the other proposal for contractual relationships between the postal service and the telegraph companies.

To take only one particular example, Postmaster General Wanamaker made a vigorous effort, inter alia, to permit the postal delivery of telegrams. Like every one of the many people who discussed it before or since (except for the instant effort in the form of a tariff application), Postmaster General Wanamaker recognized that any such injection of the postal into the telegraph service required express Congressional approval.^{6/} One of the Bills he caused to be introduced, for example, inter alia, directed the Postmaster General to contract with the private telegraph companies for

5. 1914 Sen.Doc. 36; see e.g., H.R. Rep. No. 114, 41st Cong., 2nd Sess. (1870).

6. Cf. 19 Op. Atty. Gen. 650 (1890) wherein acting Attorney General William H. Taft took the position that the Post Office could not contract to deliver telegrams in the absence of express Congressional authorization.

telegrams by mail, manifestly an identical service to the customer as that afforded by the now proposed Mailgram Service.^{7/} Postmaster General Wanamaker stated he had not discussed his proposal at any length with the telegraph companies because he did not have the statutory authority to do so.^{8/} These proposals were opposed by Western Union at that time on grounds identical to those for their opposition to public ownership, e.g., dangers of political abuse, stifling of competition, government inefficiency in general and Post Office inefficiency in particular.^{9/} Neither the Wanamaker proposals nor any proposal for Post Office involvement in the telegraph industry was ever adopted -- except that temporarily, during and after World War I, the operation of telegraph, as well as telephone and cable, was in the hands of the Postmaster General.^{10/}

During all this time when proposals for public involvement in the operation of the telegraph, in whole or in part, was being forthrightly discussed by the public and in the Congress, with universal recognition that this could not be brought about except by legislation, and when Congress was consistently rejecting the concept of public participation to any extent in private telegraph operation,

7. Hearings Before The House Committee on The Post Office and Post Roads, 51st Cong., 1st Sess. 5-7 (1890).

8. Id. at 6.

9. 1914 Sen. Doc. 25-26.

10. See Government Control and Operation of Telegraph, Telephone and Main Cable Systems, August 1, 1918 to July 31, 1919 (G.P.O. 1921).

federal administrative regulation of the private telegraph industry was beginning. The Interstate Commerce Commission was given certain limited regulatory powers by the Government-Aided Railroad and Telegraph Act of 1888, 25 Stat. 382; and was given regulation of the rates and practices of telegraph companies by the Mann-Elkins Act of 1910, 36 Stat. 539.^{11/} From 1910 to 1934, the ICC had primary responsibility for such regulation, although there was some other authority in the Postmaster General and the Executive Branch. The conclusion that more unified and comprehensive administrative regulation of the telephone and telegraph was needed led to the enactment of the Federal Communications Act of 1934 and the creation of this Commission. Public ownership and operation was perceived as one legislative policy alternative, as it had been in prior years.^{12/}

More recently, public ownership or participation in general, and in particular the type of Post Office Department involvement in the telegraph which is proposed by the instant tariff filing, was discussed in the legislative history of the Telephone and Telegraph Companies Merger Act of 1943, 57 Stat. 5, 47 U.S.C. §222. The imminent financial collapse of the private Postal Telegraph Company was the occasion for this legislation which permitted (as an exception to the Antitrust Laws) Western Union to merge with and take over that Company. There were proposals to accomplish the alternative of

11. Herring and Gross, op. cit. supra note 1, 210-211.

12. Study of Communications By An Interdepartmental Committee, publication of Senate Committee on Interstate Commerce, 73rd Cong., 2nd Sess. 5-6 (1934).

public takeover and operation.^{13/} Congress recognized that fundamental policy questions of public-versus-private ownership and operation, and the relationship of Government to a free enterprise economy were involved.^{14/} One of the most significant reasons for the rejection of public takeover was the belief that competition among the various means of communication including mails, particularly air mail, was desirable in the national welfare -- but would be seriously undermined by Government entry into the telegraph field.^{15/} Even in the midst of World War II, when the public interest in an ample and effective telegraph service was most dramatically evident, Congress deliberately selected private telegraph operation rather than public participation.

In the hearings on the 1943 Act, Secretary of Commerce Jones, testifying that the proposal had come from President Roosevelt himself, suggested "that the legislation when enacted should make provision authorizing post offices to rent space where available

13. See e.g., Sen. Rep. No. 13, 78th Cong., 1st Sess. (1943); 69 Cong. Rec. 342, 770, 776 (1943)

14. One of the principal spokesmen for the legislation in the House, Congressman Boren, for example, declared, "We are deciding here today really just one thing, one very vital, important, and fundamental issue . . . whether or not we want the Government to enter this field of business in competition with private enterprise or whether we want to permit this failing company to be taken over by way of merger . . ." 69 Cong. Rec. 778 (1943). See also Sen. Rep. No. 13, 78th Cong., 1st Sess. 5 (1943).

15. *Id.* at 5-6; H.R. Rep. No. 69, 78th Cong., 1st Sess. 3 (1943).

space existed, for telegraph offices . . ."^{16/} The President of Western Union, A. N. Williams, testified with respect to this proposal that "If anything along this line is incorporated in the bill, we suggest that it . . . permit local postmasters to contract with the consolidated domestic telegraph carrier to represent such carrier on an 'agency' basis in the acceptance, transmission, reception and delivery of local record communications in return for an agreed percentage of the tolls or charges on such communications."^{17/} This suggestion was vigorously opposed by the President W. L. Allen of The Commercial Telegraphers' Union, the predecessor of the Petitioner Union.^{18/} He pointed out that "from the viewpoint of the public, agencies are unsatisfactory for the reason that the telegrams handled by them are merely incidental to the essential business of the agency, and therefore do not receive the attention and service, and perhaps not the secrecy of handling, which the public naturally expects from the telegraph industry."^{19/}

Like all the previous proposals for Post Office Department participation in the telegraph industry, this one did not pass. Indeed, the Post Office Department, asserting it had experienced

16. Hearing Before Senate Committee on Interstate and Foreign Commerce on S.2445, Consolidations and Mergers of Telegraph Operations, 77th Cong., 2nd Sess. 44 (1942).

17. Id. at 107.

18. The name was changed to United Telegraph Workers effective August 1, 1968.

19. Hearings Before House Committee on Interstate and Foreign Commerce on S.2598, Consolidations and Mergers of Telegraph Operations, 77th Cong., 2nd Sess. 129 (1942).

difficulty in drafting "suitable legislative language," itself requested that the matter be held in abeyance.

Most recently, the Report of the Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation, Docket No. 14650 (April 29, 1966) discussed the "Transferral of the Message Telegraph Function to the Public Sector" (pp. 297-299) and concluded, "Public ownership, as a solution, does not appear to be justified at the present time" (p. 299). A number of reasons were given, including the difficulties of coordinating Telegraph Company and Post Office Department planning particularly with respect to long-range objectives and decisions, and the fact that "it is difficult to isolate any overriding social requirement for the traditional message telegraph service that would justify imposing the cost of developing a discrete communications network upon the general public through a postal deficit, or upon other classes of postal users by increased postage charges" (ibid.).

To be sure, the Report then suggested that study -- "much further study" -- be given to the partial utilization of Post Office Services by "the use of particular rapid mail services to complement the final handling of message telegraph offerings" (id. at 299-300). But at most this was a recommendation for study, particularly of the impact and viability of any such service on postal rates, and there is no indication that any such study has been effectively commenced, let alone completed as the Committees' Report suggested. Moreover, the suggestion was for study of means of "utilizing rapid mail service

for the final delivery of telegrams" specifically citing Special Delivery and ABCD Mail (id. at 299). Obviously, the instant proposal calls for no rapid mail service, only the usual first-class service. Since the time of the Report, furthermore, ABCD Service has been discontinued, an illustration of the fact that the Post Office is not able to maintain the quality of the traditional postal service, but is rather engaged in attempting only to minimize the rate of decline in the quality as effectively as possible even without the added burden of new telegram delivery responsibilities.^{21/}

This history cannot be disregarded any more than it can be rewritten. It teaches that it is Congress, and Congress alone, which has defined in general the contours and limits of national telecommunications policy, and in particular the exclusion of the Post Office Department from any hand in the operation of the private telegraph industry, specifically rejecting the postal delivery of telegrams which is the hallmark of the presently proposed Mailgram Service. This Commission cannot and should not disregard or evade the legal limits upon its authority which Congress so plainly and deliberately established. Adherence to the Congressionally imposed limits as demonstrated by unvarying history requires the granting of this Petition.

21. It is obvious that "A [postal] clerk cannot be assorting the mails and receiving telegrams at the same time; the two functions will unavoidably interfere with each other." Report of House of Representatives Committee on Post Offices and Post Roads (1869), as quoted in Wells, The Relation Of The Government To The Telegraph, 45 (1873).

II. THE PROPOSAL IS CONTRARY TO THE PUBLIC INTEREST IN VIABLE AND EFFECTIVE TELEGRAPH COMMUNICATION.

A. The Proposal Impairs the Telegraph Service.

The historic segregation of telegraph from postal service has resulted in two distinct and separate services. The public has always had and still has a clear and recognizable choice. The very rapid delivery of written communications from sender to recipient is the distinguishing characteristic of the telegraph. The mails are slower; but they provide the one kind of written communication which remains unchanged in form -- the recipient reads precisely what the sender has chosen to write, in the medium, color, emphasis and other appearances that the sender has selected.

This proposal seeks to obliterate the distinctions between the two services and to create a new hybrid. Mailgram is designed to be slower than telegraph but faster than mail. It compromises the speed which is the advantage of the telegraph. It compromises also the control over form which is the advantage of the mail, for the telegram which is sent by Western Union is transformed into the letter to be delivered by the Post Office Department. It is designed to be cheaper than the telegraph, but more expensive -- because more rapid -- than the mail.

To the extent it is successful, it will be at the expense of the telegraph or the mail; and most likely the telegraph. As the Commission is fully aware, Western Union has been egregiously derelict in meeting standards of service for the telegraph-consuming public and has been making every effort even apart from this proposal to curtail traditional physical delivery of telegrams by messenger.

In reality, this proposal is another step down the road to jeopardizing or destroying the public message service. Western Union plainly appraises this as the least profitable of its diverse and expanding activities. It would be governed by the call of its accounting sheets rather than by the needs and welfare of the public. In the end, service and deliveries would further deteriorate, and the public message service would be rendered less and less attractive to the public and less and less viable.

Thus the foreseeable result of permitting the Company proposal to take effect is to reduce rather than expand the viable communications alternatives available to the consuming public. Competition would be reduced. The public interest would surely be damaged.

3. Postal Delivery of Telegrams is Not in the Public Interest

One obvious effect of the proposal is to shift the cost of delivering telegrams from the telegram to the postal consumers. And since the Post Office is not intended to operate at a profit and, of course, is subsidized from the general Treasury by the taxpayer, the latter may well end up bearing the financial burden of Mailgram delivery whether he is a consumer of the service or not. Moreover, the postal service, to put it mildly, is imperfect. Never are its grievous deficiencies made more plainly and painfully aware to the public than at this holiday time of the year. To approve the transfer of telegram delivery to the Post Office is not just, fair, reasonable or lawful, and does not satisfy the criterion of fulfillment of the public interest.

C. Mailgrams Cannot Be Regulated as Effectively as
Purely Western Union Operation Is by This Commission

While the Commission's power to regulate purely Western Union operations is well established, that power will inevitably be inhibited and pro tanto less effective where Mailgram Service is concerned. The participation of a Government agency raises a delicate question of interdepartmental relationships. Under this proposal, "Delivery of MAILGRAMS is undertaken by the Post Office Department and that agency intends to effectuate delivery of MAILGRAMS the following POST OFFICE business day after filing" subject to specified provisions (Orig. p. 8). Without reference to the question of how Western Union can speak for the Post Office, significant questions arise. What if there should be some question or complaint about the Post Office service? How will the Commission be able to obtain pertinent information and form judgments as readily and effectively as it does now with respect to Western Union alone, when the Post Office Department is involved?

Unless the Post Office would concede that it is a "common carrier" subject to Commission jurisdiction by virtue of its participation in the Mailgram Service and to the extent of that participation, there would appear to be no statutory means for the Commission to call the Post Office Department to account or to force that Department to fulfill its intentions or obligations under the new Service. While it may be suggested that sanctions may be taken against Western Union which might be effective, the question remains whether the

ultimate sanction of requiring discontinuance of this Service can be availed of when the Post Office is involved. At the very least, considerations of administrative comity may work to inhibit Commission action which might otherwise be taken. Beyond that, all questions involving the Post Office seem invariably to generate special and augmented pressures which might introduce atypical forces into Commission action. Every factor added to the situation by Post Office participation works to reduce the effectiveness of Commission regulation.

It can hardly be considered proper or lawful for the Commission to permit a proposal to take effect which tends to destroy the public message service, make telegram delivery service more costly to the taxpayer and no more reliable than the mails, and render Commission regulation of the telegraph industry more difficult. The proposal violates the public interest criteria of the Act and should thus be suspended as unlawful.

D. The Proposal is Discriminatory

This proposed service is discriminatory and thus violative of the Act under more than one standard. As between Western Union and other common carriers, there is discrimination in the fact that similar postal facilities are evidently not being offered to the other carriers. Other domestic or international carriers might well prefer to transfer their delivery burdens to the Post Office Department in the fashion here proposed by Western Union, if only they were aware that such an alternative were available to them. But there is no indication that the Post Office and Western Union have

given them any clue that such a radically new procedure might be available. In addition, as between the different classes of Western Union customers, there is discrimination as between the INFO-COM and Telex subscribers on the one hand, for they are the only ones to whom this service will be available during the two-year period covered by this filing, and all other Western Union customers on the other hand, for they cannot avail themselves of this service and, indeed, will likely not even know of its existence. Accordingly, the proposal is unlawful on the ground of discrimination.

E. The Proposal Jeopardizes and Impairs the Job Status and Security of Western Union Employees

The very point of the proposal is to transfer telegram delivery functions from Western Union to Post Office employees. Those functions include not only messenger but also clerical work of various types. Manifestly, the employees of Western Union who now are engaged in that work, and their dependents, and all Western Union employees engaged in the public message service, are threatened by this proposal. Should it approve this proposal, the Commission would be jeopardizing and impairing the job status and security of countless Western Union employees.

There are obvious public policy considerations on this score which Congress certainly intended the Commission to consider. Cf. 47 U.S.C. §222(f). There is no social gain in causing unemployment and reducing incomes of persons now employed in the private sector, only to transfer the same or similar types of work and numbers of jobs to the public sector. Especially is this true in the face of the other compelling reasons for suspending this proposal discussed in this Petition.

III. THE COMPANY PROPOSAL IS UNLAWFUL BECAUSE IT REQUIRED ACTION BY THE POST OFFICE DEPARTMENT WHICH IS BEYOND ITS STATUTORY AUTHORITY.

This Western Union proposal requires that the Post Office Department receive telegrams upon Western Union equipment to be installed on Post Office property and deliver the telegrams by having its employees separate them from the equipment, stuff them into envelopes and mail them by first-class mail to the addressee. The proposal is unlawful because it is beyond the authority of the Post Office Department. Like every other Executive Department or Government agency, the Post Office Department can lawfully exercise only those powers which the Congress has granted it. Title 39, U.S.C., which governs the Postal Service, demonstrates that Congress confined the authority and functions of the Department strictly to those traditionally regarded as postal.

On its face, Title 39 is most detailed and meticulously drafted. The grants of authority to the Post Office Department are sharply defined and rigidly circumscribed. They obviously reflect delicate Congressional compromises of bitterly competing interests and values. Congress intended that the powers not explicitly granted be withheld. This is the ineluctable conclusion to be drawn from a statutory scheme which is expressed in such minute detail as to regulate with great precision such areas as postage meters (§4053), rents on post office boxes (§708), contracts for stamped envelopes and other specific printing and supplies (§2004), the authority of the Postmaster General to accept gifts (§2101), the right to deliver

stolen money to the owner (§2410) and the right to provide a cancellation bearing the words "Pray for Peace" (§2509). These are illustrative only. Title 39 itself is the complete catalogue of such provisions.

Title 39 will be searched in vain for any authority whatever for the Post Office Department to enter into a relationship with the telegraph industry for the delivery of telegrams such as is proposed in the instant petition. There is no provision, express or implied, which lends the slightest support to any such proposal. As is made quite clear by the history of proposals to relate the postal to the telegraph service set out in I above, this lack of Post Office authority to embark on telegraph operations is no inadvertence but the embodiment of conscious, deliberate public policy to keep the two, postal service and telegraph service, apart and separated one from the other.

This proposal thus requires the Post Office Department to undertake telegram delivery activities which are beyond the legal authority of the Department and are unlawful. What is unlawful under any genuine standard can hardly be approved as lawful by this Commission.

One facet of the unlawfulness of any Commission sanction for this proposal is that the effect of any such Commission action is to approve postal rates; indeed the effect is to establish a new class of postal service altogether. Clearly, postal rates cannot lawfully be set, in whole or in part, by any procedure other than that established by the Congress for that purpose. See generally

39 U.S.C. §2302. And Congress has defined the various classes of postal service. Surely only Congress can create new classes of postal service. Certainly the Commission has no authority to lend its approval to the establishment of postal rates and new postal classes.

On the present record, there seems no way for the Commission to know to what extent the Mailgram Service violates the Congressional touchstone that "it would be an unfair burden upon any particular user or class of users of the mails to compel them to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users of the mails, or to underwrite those expenses incurred by the postal establishment for services of a nonpostal nature" (39 U.S.C. §2301(5)).

Sections 6208 and 6209 of Title 39 further support this conclusion. They prescribe that the Interstate Commerce Commission shall determine the rates which railroads shall charge for transportation of mail, and establish a procedure for the Postmaster General to participate in and to initiate such rate making. With respect to air mail, Sections 6301-6303 set forth certain procedures and standards for air mail transportation including adherence to Civil Aeronautics Board regulations. These provisions demonstrate that Congress was very well aware of the independent regulatory agencies and included express provisions with respect to those agencies having jurisdiction over areas in which the Congress was authorizing the Post Office Department to act. There is no provision which refers to the Federal Communications Commission. Manifestly,

Congress was not authorizing the Post Office Department to participate in any action which would require consideration or action by this Commission, or to charge rates or create new classes of postal service subject to Federal Communications Commission approval. Moreover, 39 U.S.C. §1(v), in defining "revenue of the Department" expressly includes "commission on toll telephones located in buildings under the custody of the Department." Clearly, had Congress anticipated that there would be commissions on any revenues from the telegraph industry, or particularly revenues from telegraph equipment located in buildings under the custody of the Department, it would have included these in this definition.

In view of the foregoing discussion of Title 39 and of the history of Post Office requests, all denied, for Congressional authority for it to participate in the telegraph industry, there can be no reasonable doubt that Congress has not authorized, but has proscribed, any such relationship between Western Union and Post Office Department as is here proposed. This filing is plainly illegal and must therefore be suspended.

CONCLUSION

For the reasons stated herein, the Commission should grant this Petition to Suspend The Western Union Telegraph Company Tariff Material Transmittal No. 6411 proposing a new type of service to be known as Mailgram Service.

Respectfully submitted,

COLE AND GRONER

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Telegraph Workers, AFL-CIO

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition to Suspend was served upon The Western Union Telegraph Company this 18th day of December, 1969, by mailing a copy thereof by first-class mail, postage prepaid, to Bernard Jaffe, Director-Tariffs of The Western Union Telegraph Company, at his office at 60 Hudson Street, New York, New York.

Isaac N. Groner

Isaac N. Groner

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

THE WESTERN UNION TELEGRAPH COMPANY)

) Tariff Material

PROPOSAL FOR NEW TYPE OF SERVICE TO)

) Transmittal No. 6411

BE KNOWN AS MAILGRAM SERVICE)

REPLY TO UNITED TELEGRAPH WORKERS,
AFL-CIO'S PETITION TO SUSPEND

The Western Union Telegraph Company (Western Union), pursuant to Section 1.733(c) of the Commission's Rules and Regulations, hereby submits its Reply to the United Telegraph Workers, AFL-CIO's (Union) Petition to Suspend the captioned tariff filing (Transmittal No. 6411). In support hereof, it is respectfully shown as follows:

Petitioner's Contentions

In essence, the Union contends that the Commission lacks power to sanction the Mailgram experiment because it allegedly constitutes a change in telecommunication policy; that the Post Office Department lacks statutory authority to participate in the Mailgram experiment; that the Mailgram experiment is contrary to the public interest because it allegedly impairs telegraph service, shifts the cost of delivery of telegrams from Western Union to the Post Office, prevents the Commission from regulating Mailgram service as effectively as the present Western Union operations,

discriminates against other common carriers and against the customers of other Western Union services; and that it jeopardizes and impairs the employment status of Western Union employees.

As will be shown below, the contentions of the Union are devoid of merit.

Description of Mailgram Service

At the outset it is important to note that the tariff in question is experimental in nature. This experimental Mailgram service will be offered to Telex customers (through Western Union's Information Service Computer System (ISCS)) connected to a Telex exchange in one of 12 cities, namely:

Atlanta, Ga.

Detroit, Michigan

Boston, Mass.

Kansas City, Mo.

Charlotte, N. C.

Miami, Fla.

Cincinnati, Ohio

Newark, N. J.

Dallas, Texas

Seattle, Wash.

Denver, Colo.

Washington, D. C.

The service will also be available to INFO-COM customers located in the above cities.

Thus, these Telex and INFO-COM customers will be able to send a Mailgram to addressees located within the 48 contiguous States and the District of Columbia who do not have a receiving teleprinter on

on their premises. This will be achieved by placing a receiving teleprinter in 110 serving Post Offices, strategically located throughout the 48 contiguous States and the District of Columbia, so as to generally permit next day delivery of a Mailgram sent before a specified cut-off time. (See Sections 2.3 and 5.2 of Tariff).

A subscriber will access the service by dialing into the communication network and transmitting his message using a prescribed format which will include the serving Post Office's routing indicator, routing number and zip code of the destination address. The ISCS will analyze the routing information and route the message to the ISCS serving the destination post office.

The Post Office personnel located at the 110 serving Post Offices will remove the Mailgram (which is the transmitted message printed out on a teleprinter), from the printer terminal, scan the message for completeness, fold, insert in a window envelope, seal and place it in the first class mail stream. While the handling at the Post Offices will be manual in the initial stage of the two-year Mailgram experiment, it is anticipated that new equipment can be designed which will automatically fold the message, and stuff and seal the envelope.

From the above brief description, it is apparent that the manner in which the proposed service will be provided will enable the offering of a reasonably fast and economically priced service with characteristics that fall between present telegram and postal service offerings. Since acceptance and transmission over most of the route will be performed by the Telegraph

Company, an excellent speed of service will be obtainable, although at a cost higher than regular mail for this portion of the offering. Since delivery will be performed by the Post Office, through the mails, a deferred speed of service will be involved, but the volume operations will permit a much lower cost to be associated with this portion of the service offering as compared to telegrams. The combination of the two basic aspects of the service will result in a service that will be faster than mail, slower than telegrams, but at an attractive cost to the public.

The Commission Has Authority to Permit
the Rendition of Mailgram Service

The Union goes to great length in its Petition (pp. 3-12) in an effort to demonstrate that only Congress can authorize the Postmaster General "to participate in the operation of the telegraph industry and to assume responsibility for the delivery or any other aspect of the transmission of telegrams from sender to addressee" (Petition, p. 4). The short answer to this contention is that the Post Office is not participating "in the operation of the telegraph industry." That is apparent from a reading of the Tariff. The Post Office, for all intents and purposes, is performing a postal function, not a telegraph function (See pp. 8-10 of Tariff). There is nothing in our national telecommunication policy which prohibits the use of the United States mail for mailing a telegram any more than such policy prohibits the use of the telephone for the receipt or delivery of telegrams.

Be that as it may, should it be determined that further statutory authority is required by the Postmaster General to handle Mailgrams on a permanent, as distinguished from an experimental, basis, it can be presumed that such authority will be sought from the Congress.

The Post Office Department Has Statutory
Authority to Engage in the Mailgram Experiment

The Union contends (pp. 18-21) that Title 39 of the United States Code demonstrates that "Congress confined the authority and functions of the Department strictly to those traditionally regarded as postal" (p. 18). Various sections of Title 39 are given as examples in support of that contention. However, the Union failed to cite one section of the Code which specifically gives the Postmaster General authority to participate in the Mailgram experiment, namely, Section 504(a). That section provides in pertinent part that:

"The Postmaster General shall maintain in the Department a research and development program, including investigations and studies * * *."

The inference contained on page 20 of the Petition that Mailgram service may constitute an unfair burden on other users of the mail services will be treated below.

Mailgram Service Is in the Public Interest

The philosophy underlying the Mailgram offering as a new service is not unlike the philosophy which prompted the introduction of other new

services in the recent past, such as Private Line Telegraph Service, which was designed to meet the need and demand of the relatively large volume users whose needs could not economically be met by the then existing record message services, and Telex and TWX services, which were designed to meet the needs of the moderate volume users whose needs, again, could not be met economically by the then existing record message services.

In Western Union's opinion, there is a need and demand for Mailgram service which cannot be economically met by the existing record message services. Historically, the implementation of Private Line Telegraph Service, Telex and TWX services resulted in significant increases in the gross number of record communications. It is Western Union's expectation that the Mailgram service offering will further significantly increase the gross number of record communications.

The existing telegram and mail services will continue to be available to the general public in the same manner as they are today. There is no intention by Western Union to eliminate the Telegram or the Overnight Telegram. Contrary to the assertion of Petitioner (p. 13), the Mailgram proposal does not obliterate the distinction between telegraph and mail services, but rather accents them by creating an additional service which has as its elements electronic transmission and mail handling features for local delivery.

In order for Mailgram service to be successful from Western Union's viewpoint, the service will have to result in a significant increase

in the overall volume of record messages. Preliminary studies that the Company has made indicate that this will happen. If Western Union felt that the Mailgram service offering would merely result in a one for one diversion from the telegram message service, as implied by the Petitioner, the Mailgram offering would not have been made since it is highly unlikely that the revenue differential between a Mailgram message and a telegram could be offset by cost savings. On the other hand, Company studies lead to the firm conclusion that there is a definite need and demand for Mailgram service with a potential, over a long range period, in the hundreds of millions of messages annually. For example, if Mailgram service captures 1% of the volume of first class mail it would result in excess of 400 million messages per year.

The Commission is well aware of the fact that Western Union has not earned anything resembling a fair rate of return for many years. Surely, it should not be thwarted in its efforts to meet a public communication need which is not being met by any service presently available. Mailgram service could go a long way to improve Western Union's viability and its ability to compete in the communications market. Clearly, efforts at experimentation with new services should not be thwarted or delayed at the threshold.

Western Union disagrees with Petitioner's contention (p. 14) that the Mailgram service will be a burden to postal consumers. Mailgram

service takes cognizance of the fact that the per unit costs of postal delivery are significantly lower than the per unit cost of Telegram delivery. Mailgram service contemplates using the economies of fill associated with postal delivery to provide a new service to the American public. The Company's agreement with the Post Office contemplates payment by the Company of a postal charge and a service charge for each Mailgram placed in the mails. The postal charge was established at 10¢ per Mailgram, although most Mailgrams will not utilize normal Air Mail facilities, inasmuch as the intercity transportation of the Mailgram will be performed over Western Union facilities, thereby reducing the number of postal handlings normally associated with a letter. Thus, it is obvious that to the extent the normal 10¢ Air Mail charge fully covers Post Office costs for the handling of Air Mail letters, Mailgrams handled at this same charge must produce a margin of revenues in excess of cost. Further, it is indicated in The Report of the President's Commission on Postal Organization, June 1968, p. 31, that "under cost ascertainment only first class and air mail cover their fully allocated costs." Accordingly, the 10¢ charge paid to the Post Office cannot help but fully cover Mailgram postage costs and, therefore, not result in a burden on postal customers in general. Moreover, the additional service charge of 15¢ paid by Western Union to the Post Office during this experimental period will compensate the Post Office for providing space and power for the equipment located on its premises, the labor associated

with the removal of the Mailgram, the stuffing and sealing the envelope, etc. It is anticipated that the 15¢ charge might be reduced at such time as Western Union can provide automated terminal handling equipment. The successful offering of Mailgram service will, therefore, not only meet a public need, but will aid in reducing the Post Office Department deficit, both aspects of which are definitely in the public interest.

The Union contention (pp. 15-16) to the effect that the Mailgram service cannot be regulated effectively is equally lacking in merit. Obviously, the Commission has full regulatory powers over the common carrier services performed by Western Union. That the Commission cannot regulate the mail service performed by the Post Office Department is, of course, true. But what is overlooked by Petitioner is that the Commission has the authority to determine whether the Mailgram service offering as such, which contemplates delivery by mail, and the delivery risks associated therewith, should be permitted.

Equally lacking in merit is Petitioner's contention (pp. 16-17) that the experimental Mailgram service is discriminatory because it is not available to the general public and to other common carriers. We do not understand the contention regarding other common carriers and, therefore, cannot respond thereto. As to the lack of availability to the general public, it is apparent that a new experimental service such as Mailgram must start somewhere. The Commission is well aware of the fact that experimental offerings have been permitted by the Commission. It is also well

aware of the fact that limited offerings have been permitted in new services such as Telex.

Finally, with respect to the contentions regarding possible job security, the short answer is that new services which meet a public need and demand generate a greater possibility of retention and addition of employees than having the Company sit back and "let the world go by".

CONCLUSION

In view of the foregoing, we respectfully urge the Commission to deny the Petition to Suspend and permit the Tariff in question to go into effect as of January 1, 1970.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

By *Jack Werner*
/s/ Jack Werner
Jack Werner

Its Attorney

1828 L Street, N. W.
Washington, D. C. 20036

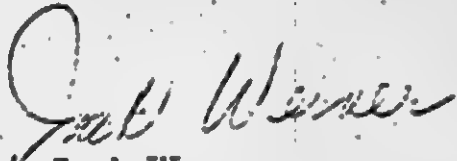
Of Counsel:

John M. Evans
60 Hudson Street
New York, N. Y. 10013

December 26, 1969

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply was served this 26th day of December, 1969, upon the United Telegraph Workers, AFL-CIO, by mailing a copy thereof by first class mail, postage prepaid, to its counsel, Isaac N. Groner, 1730 K Street, N. W., Washington, D. C. 20006.


/s/ Jack Werner
✓ Jack Werner

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

THE WESTERN UNION TELEGRAPH COMPANY
PROPOSAL FOR NEW TYPE OF SERVICE TO
BE KNOWN AS MAILGRAM SERVICE

Tariff Material
Transmittal No. 6411

* * * * *

RESPONDING MEMORANDUM OF UNITED TELEGRAPH WORKERS,
AFL-CIO, IN SUPPORT OF PETITION TO SUSPEND

1. The Company's Reply to the Petition to Suspend confirms that there are many fundamental issues in this Company submission which is styled a tariff transmittal but which is actually a proposal for a radically new service. And the Reply provides no reasons whatsoever for any Commission refusal to take the time carefully to consider these fundamental issues. Absolutely no reason is given why the proposed service must take effect on January 1, 1970, in a haste which would preclude full consideration, rather than only a few months thereafter, after a hearing and full consideration of all the issues could be had.

2. Inasmuch as this is concededly a proposal for a new type of service, never before offered in the history of the telegraph company or the United States Post Office, there is serious question whether it can appropriately be dealt with in the form of a tariff transmittal. Indeed, as we demonstrated in our Petition -- without

genuine response from the Company -- this proposal for a joint Company-Post Office service should be addressed to the Congress not to the Commission. There is serious question whether the Commission may lend its imprimatur of approval to this new system either by refusing to suspend it or in any other way. The fact remains that Section 201 and the entire Act delineate what a common carrier like the Company may do, including inter-connections with other carriers, upon and only after Commission approval. There is nothing in the Act which provides either expressly or by implication that the Company may enter into and act upon this kind of arrangement with the Post Office. The general purpose of the Act and of the Congressional establishment of the Commission was to make available "to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service " (47 U.S.C. §151); and the Act obviously embraces the complete process of wire communication from initiation to and including delivery. Section 153(a) defines "Wire communication" as "including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications)" (emphasis added throughout).

The Company's concession that the Commission will not be able to regulate the delivery portion of this service provided by the Post Office (Reply, p.9) is a demonstration that this service lies beyond the authority of the Company to offer or to operate, and likewise beyond the authority of the Commission to approve.

The only reply which the Company can muster to our initial point that this should be submitted to Congress rather than the

Commission is to say that "the Post Office, for all intents and purposes, is performing a postal function, not a telegraph function" (Reply, p.4). So far as we are aware, it never has been, and will not now be for anyone other than the Company, "a postal function" to have "The Post Office personnel located at the 110 serving Post Offices * * * remove the [message submitted by a private individual or business] (which is the transmitted message printed out on a teleprinter), from the printer terminal [located on Post Office property], scan the message for completeness, fold, insert in a window envelope, seal and place it in the first-class mail stream" (id. at 3). This is manifestly not the normal postal function. There is obviously much more here than "the use of the United States mail for mailing a telegram" (ibid.), which the Company has in fact been doing for confirmation copies and which would involve no radical change in the separate "telegraph" and "postal" services with which the people are familiar and which Congress has repeatedly approved as a matter of deliberate national policy. In any realistic, historic sense, this is not a "postal" service.

There is nothing in the history of the national telecommunications policy, which we discussed in our Petition and which is tacitly conceded to be accurate and valid in the Reply, which permits any conjunction between telegraph and Post Office on an experimental or any other basis. The concession that legislation may be required to offer this on a permanent basis (Reply, p.5) is a concession which affirms the lack of authority in the Commission

to permit the Company to engage in this, because the Company has no authority to join with the Post Office, and the Commission has no authority to sanction such joinder, on any basis, experimental or permanent.

3. While failing to meet the point that it and the Commission have no authority to join together with the Post Office on any such service on any basis, the Company asserts that the Post Office has authority to engage in experiments. But the Company does not quote all of Section 504(a) upon which it relies for this assertion. All of that Section is pertinent. The entire Section is as follows: "The Postmaster General shall maintain in the Department a research and development program, including investigations and studies, for the purpose of introducing or improving equipment, supplies, methods, procedures, means, and devices used in the Department in order that its business may be more efficiently and economically operated."

There is not one syllable in the Reply which suggests that the Company's proposed Mailgram Service is to increase the efficiency and economy of the postal service. Quite undeniably, the contrary is true. This is a Company proposal based on alleged benefit to the Company, sought to be justified by the Company as contributing to the expansion of its -- the Company's and not the Post Office's -- business and economy. Certainly there is nothing in Section 504 which suggests that Congress ever intended that Section to enable the Post Office to violate the historic and reiterated national telecommunications policy of the Congress merely by invoking the talisman of research or development. Congress decreed

a separation of Telegraph and Post Office; it did not sanction a trial any more than a lawful marriage.

4. Finally, with respect to job security, the Company in effect concedes that job security in the existing services will be impaired, but offers the speculation that this proposed service will prove so successful that it may ultimately "generate a greater possibility of retention and addition of employees" (Reply, p.10).

Section 222 of the Act is a sufficient demonstration of the Congressional policy of safeguarding the rights of employees when drastic changes are proposed in the operation of the telegraph company. To permit the Company to go ahead without safeguards for these employees is to frustrate national policy. Especially is this true in the light of the many substantial doubts about the legality of the entire proposal.

CONCLUSION

By adopting the guise of a tariff submission, the Company is seeking to avoid a hearing and such thorough Commission consideration as would attend a frank avowal that it is engaged in embarking upon a brand new service, without any consideration from the viewpoint of the public as to the convenience and necessity in justification of the service or as to the impact upon the historic national telecommunications policy of segregation of telegraph from postal services. The Commission should not suffer the Company to make such short shrift of the regulatory responsibilities of the Commission in the public interest. The Company has not even attempted to establish that there is such a pressing need for haste. It has not

suggested any damage which might attend it by such a delay as would permit due process to operate.

For the reasons stated herein and in the Petition, the Petition should be granted, this new system should be suspended, and a hearing and duly deliberative procedures should be undertaken so that the Union may have an adequate opportunity to prove that this proposed Mailgram Service should not be permitted to take effect.

Respectfully submitted,

COLE AND GRONER

By

Isaac N. Groner
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for United
Telegraph Workers, AFL-CIO

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Responding Memorandum was personally served upon Counsel for the Company, Jack Werner, Esq., 1828 L Street, N.W., Washington, D.C., 20036, this 29th day of December, 1969.

Isaac N. Groner

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

Petition by the United Telegraph Workers
Union for Suspension and Investigation of
the Proposed MAILGRAM Service Offering of
The Western Union Telegraph Company

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1969; Released: January 2, 1969[sic]

By the Commission: Commissioners Bartley and Wells absent;
Commissioner Johnson concurring in part,
dissenting in part and issuing a statement.

1. The Commission has before it a petition filed on December 18, 1969, by the United Telegraph Workers which requests suspension and investigation of the new proposed Tariff F.C.C. No. 256 of The Western Union Telegraph Company applicable to a new service offering known as MAILGRAM Service. Also, on December 17, 1969, the Commission received a letter from the Communications Workers of America which raised a question as to the legal status of the Post Office Department in the joint service. This new tariff was filed on December 1, 1969, under Transmittal No. 6411, to be effective on January 1, 1970, for an experimental period of two years. In its letter of transmittal the telegraph company states that MAILGRAM Service is a new type of communications service which utilizes the telegraph company's Information Services

Computer System and other service facilities in conjunction with the U. S. Post Office Department's mail facilities for the acceptance and delivery of communications normally on the following business day.

2. In its Petition to Suspend the United Telegraph Workers alleged that the proposed tariff offering of Western Union was unlawful in that it "(1) is not a routine tariff amendment within the jurisdiction of the Commission to grant but a fundamental and radical change in national telecommunications policy, which should be addressed to and can only be granted by the Congress, (2) is contrary to the public interest in viable and efficient telegraph communication, and (3) requires unauthorized action by the Post Office Department."

[2]

3. With respect to the allegations as to the Commission's jurisdiction, it is manifest that the portion of the service furnished directly by Western Union is a common carrier communication service subject to our jurisdiction. Moreover, it is not unprecedented for a common carrier to furnish service in conjunction with a governmental agency. This is not to say, however, that there may not be practical problems involved in this division of responsibility. This matter will be carefully observed by the Commission. So far as the authority of the Post Office to participate in this service is concerned, we feel that this is a matter for that agency to resolve, and that the Commission should take no position with respect thereto.

4. The public interest factors cited by the unions are highly speculative. Thus the petition of UTW avers that to the extent the

service is successful it will impair the public message service. It is not clear, however, how this will come about and UTW offers no specifics which would raise a substantial issue in this respect. Another allegation is that since the taxpayers subsidize the Post Office, this service will further burden them. However, material submitted with the tariff indicated that the portion of the charge to the customer which will accrue to the Post Office is designed to fully cover its costs. This is, of course, subject to adjustment with experience and, in any event, we must assume that the Post Office is capable of protecting its fiscal interest. UTW asserts that the service is discriminatory in that no other carriers are afforded the opportunity for postal delivery, and the service is available only to Telex and Infocom subscribers of Western Union. There is no indication that any other carrier wishes to furnish a similar service. Moreover, Western Union has indicated its intention to extend the service to other classes of users when arrangements can be developed to do so, and provided the initial experiment indicates that such an extension is warranted. Finally, UTW alleges that the service will impair and jeopardize the job status of Western Union employees. However, it fails to demonstrate how this result will necessarily follow. It would appear that to the extent the new service will accomplish its objective of generating new traffic on a profitable basis, the opposite result may ensue.

5. Although the effects of the service, desirable or undesirable, cannot be ascertained fully without experience, we

believe the service offers sufficient promise of public benefit to warrant such experimentation. It therefore appears appropriate to permit the tariff schedules to become effective subject to certain reporting requirements which will enable the Commission to take appropriate action should any undesirable results eventuate. For example, should Western Union seek to close public offices as a result of any diversion of business caused by MAILGRAM service the Commission would expect to give close scrutiny to the company's justification for such action. As noted above, the Commission will also ascertain whether the separate responsibilities of Western Union and the Post Office give rise to any problems in the operation of the service which will require appropriate corrective action.

6. Accordingly, IT IS ORDERED, That the petition to suspend of

[3]

the United Telegraph Workers IS DENIED;

7. IT IS FURTHER ORDERED, That The Western Union Telegraph Company shall file such reports and information with respect to its MAILGRAM service as the Chief, Common Carrier Bureau, shall direct.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

*Commissioner Johnson issuing a statement at a later date.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

THE WESTERN UNION TELEGRAPH COMPANY,
Intervenor

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER

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Wells, <u>The Relation of the Government to the Telegraph</u> (1873).	11,13,44

*Cases or authorities chiefly relied upon are marked by an asterisk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents

THE WESTERN UNION TELEGRAPH COMPANY,

Intervenor

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER

ISSUES PRESENTED FOR REVIEW

The Federal Communications Commission Order involved in this case approved a new joint telegram-mail service under which certain telegrams, while still being accepted for transmission in the normal way by The Western Union Telegraph Company, will be transmitted to United States Post Offices for processing and delivery to the addressees by Post Office employees. The ultimate issue presented for review herein is whether approval of any such new system is lawful; and in particular whether it is lawful under any of the following touchstones:

1. The historic national telecommunications policy, deliberately established and consistently maintained by the Congress, that there be no joint telegram-mail service, but that telegraph service should be provided entirely by private enterprise, without any participation by the Post Office Department of the Government in the operation of the telegraph.

2. The purposes and provisions of the Communications Act of 1934, as amended.

3. The postal laws of the United States.

4. The failure of the Commission in this matter to:
(a) comply with the procedures required by the Act for the issuance of a certificate of public convenience and necessity; (b) consider whether the service was lawful under the postal laws of the United States; (c) give adequate consideration to the discriminatory aspects of Mailgram; (d) give adequate consideration to the impact upon employee job security; or (e) provide any such factual record or legal discussion as can sustain this Order upon judicial review.

The instant case has not been before this Court on a prior occasion.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§151 et seq., are set out in the Statutory Appendix to this Brief, p. 1a, infra.

REFERENCES TO RULINGS

The Memorandum Opinion and Order of the Federal Communications Commission, adopted on December 31, 1969 and released on January 2, 1970, sets forth the basis of the decision below, and is reproduced in the Appendix at pp. 72-75.^{1/}

STATEMENT OF THE CASE

Nature of the Case

This is a Petition for Review of a Memorandum Opinion and Order of the Federal Communications Commission ("FCC") which approved the institution of a new type of communications service, to be known as "Mailgram," by The Western Union Telegraph Company, the Intervenor herein, in conjunction with the United States Post Office Department. The FCC Memorandum Opinion and Order disposed finally on their merits of all the legal and other objections which had been raised against Mailgram by the United Telegraph Workers, AFL-CIO ("Union"), the Petitioner herein, which had filed with the FCC a Petition to Suspend Mailgram. Inasmuch as the Memorandum Decision and Order disposed of the claims and rights of the Union finally and completely as a practical matter, the FCC Memorandum Opinion and Order is a final order subject to the jurisdiction of this Court under 47 U.S.C. §402(a) and 28 U.S.C. §2342.

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1. The Appendix will be hereinafter referred to as "App."; and the Supplemental Appendix of Exhibits, as "Supp. App." The Memorandum Opinion and Order of the FCC inadvertently bears a release date of January 2, 1969 instead of January 2, 1970.

The New "Mailgram" Service

Approved In This Case

A "new type of communications service" has been approved by the FCC in this case, new because it involves an unprecedented fusion of private telegraph and public postal operations.

This new service, which is referred to as "Mailgram", is intended ultimately to be offered to the general public, but the FCC Order below approved an initial offering involving a two-year period, calendar years 1970 and 1971, during which Mailgram would be available in twelve cities to the Telex and Info-Com customers of Western Union who have equipment which sends and receives telegrams on their own premises (App. 3, 12; Supp. App. Tab B, 2, 8). The service routinely provided these customers is a purely telegram service, whereby they transmit messages on Telegraph Company equipment over Telegraph Company wires to receiving equipment located on the premises of the Telegraph Company or Telegraph Company customers, and the messages are processed, routed and delivered by Telegraph Company or Telegraph Company customer employees (id. at 2-3). The new Mailgram service effectuates a radical change in the receipt and delivery of the telegrams, however, for the receiving equipment for Mailgram is not located on the premises of the Telegraph Company or Telegraph Company customers, nor are received messages processed, routed or delivered by Telegraph Company or Telegraph Company customer employees. Quite to the contrary, the receiving equipment will be located on public premises in United States Post Offices,

110 in the initial proposal, presumably virtually all Post Offices thereafter (id. at 5). Post Office employees "will remove the Mailgram (which is the transmitted message printed out on a teleprinter), from the printer terminal, scan the message for completeness, fold, insert in a window envelope, seal and place it in the first class mail stream" (App. 57). The objective of Mailgram is to provide "delivery of communications normally on the following business day" (App. 3). Although the Mailgram service is designed to provide a complete message service from a "customer" to his addressee (App. 13; Supp. App. Tab B, 3-4), the Telegraph Company is expressly relieved of all responsibility for "any act, omission or delay by the Post Office Department in the delivery or non-delivery of the Mailgram after it is placed in the mail" (Tariff Regulation 5.4.2(B), App. 18). Mailgram is intended to "improve Western Union's viability and its ability to compete in the Communications market" (App. 61).

The Limited Proceedings Below

The Western Union Telegraph Company, the Intervenor herein, sought FCC approval for this new "Mailgram" service on December 1, 1969, by filing with the FCC certain papers it denominated as "tariff material" (App. 3-29). The United Telegraph Workers, AFL-CIO ("Union"), the Petitioner herein, which represents the employees of Western Union (except for a bargaining unit in New York City), filed a Petition to Suspend with the FCC, on December 18, 1969, in capsule contending that Mailgram was unauthorized and illegal for three separate and independent reasons:

(1) Congress had historically and consistently refused to authorize any joint Telegraph Company-Post Office operations, including in the Communications Act of 1934, 47 U.S.C. §§151 et seq. ("Act"), so that any application for such service must be addressed to the Congress and the FCC is not authorized to approve it; (2) Mailgram is contrary to the public interest, inter alia, because of its anti-competitive and discriminatory effects, and its unfair impact on Telegraph Company employees; and (3) Mailgram's provisions for Post Office participation was contrary to the postal laws of the United States (App. 33-54). The Company filed a Reply on December 29, 1969 (App. 55-65), and Petitioner, a Responding Memorandum also on December 29, 1969 (App. 66-71). There was no hearing before the FCC.

The Decision Below

On December 31, 1969, less than a month after the proceeding began, the FCC denied the Union's Petition to Suspend and held that Mailgram was lawful and in the public interest, and could be implemented immediately and without any further hearing or investigation or administrative action (App. 72-75). The FCC rejected the contention that Congress had granted it no authority to approve such joint Telegraph Company-Post Office service with the observation that "it is manifest that the portion of service furnished directly by Western Union is a common carrier communication service subject to our jurisdiction" (App. 73). Without any citation or discussion, the FCC asserted, "it is not unprecedented for a common carrier to furnish service in conjunction with a

governmental agency" (ibid.). The FCC expressly declined to give any consideration whatsoever to the contention that Mailgram violated the postal laws of the United States, declaring that "So far as the authority of the Post Office to participate in this service is concerned, we feel that this is a matter for that agency to resolve, and that the Commission should take no position with respect thereto" (ibid.).

The FCC likewise summarily dismissed the public interest considerations raised by the Petition to Suspend. The only limitations it placed on absolute and unqualified approval were: that it "would expect to give close scrutiny" to the Company's justification for closing any of its public offices (App. 75); that the division of responsibility between the Telegraph Company and the Post Office would be "carefully observed by the Commission" and "the Commission will also ascertain whether the separate responsibilities of Western Union and the Post Office give rise to any problems in the operation of the service which will require appropriate corrective action" (App. 73, 75); and the FCC directed Western Union to "file such reports and information with respect to its Mailgram service as the Chief, Common Carrier Bureau, shall direct" (App. 75). As a consequence of the FCC decision, Mailgram became effective on January 1, 1970.

ARGUMENT

I. THE NATIONAL TELECOMMUNICATIONS POLICY, DELIBERATELY ADOPTED AND CONSISTENTLY FOLLOWED BY THE CONGRESS, PRECLUDES ANY SUCH JOINT TELEGRAM-MAIL SERVICE AS MAILGRAM.

This FCC decision repudiates the rich heritage of the entire history of the relationship between the Government and the telegraph industry in this country, a history in which is engraved a policy of separation between private telegraph and public Post Office which the FCC has now breached. Time after time, that history teaches, proposals have been made for public operation of the telegraph, or for Post Office participation in the administration or operation of the telegraph, including in particular proposals for just such Post Office receipt and delivery of telegrams as the new Mailgram service. They always have been made to the Congress before this time, for never before has administrative authority to legitimize any such union been presumed. They have always been rejected by the Congress. A review of the entire history of the national telecommunications policy, to which we now turn, demonstrates how profound and persistent has been the Congressional purpose to maintain the private enterprise characteristic of the telegraph industry and to keep the Post Office out of the administration and operation of the telegraph.

A. The Telegraph From Its Beginning To 1847.

In contrast to subsequent telegraph history, the very first telegraph line, which was built in 1844 connecting Washington and Baltimore, was owned by the Government and was operated

by the Postmaster General.^{2/} With that first telecommunications service began the policy struggle which historically dominated the Congressional discussions and decisions on the subject, the dispute as to the proper role of Government, the resolution of which defined the paramount component of the national telecommunications policy upon which we rely. [In barest summary, the critical issue in dispute was whether the telegraph industry in the United States should be developed, operated and administered by public officials or by private enterprise. The champions of public ownership and operation invariably designated the Postmaster General as the official to be in charge, and the Postmasters General themselves generally recommended public ownership and operation.

In 1846-1847, for example, Postmaster General Johnson strongly recommended that the Government buy and control all the telegraph lines which had been constructed to that time; and that the national telegraph policy should be public ownership and operation of the entire industry under the exclusive authority of the Post Office.^{3/} Congress rejected these recommendations very emphatically indeed, for it failed even to appropriate adequate

2. Government Ownership of Electric Means of Communication, Sen. Doc. 399, 63rd Cong., 2nd Sess. (App. A, pp. 18 et seq. "Historical Resume of Agitation for Government Ownership of the Telegraph and Telephone of the United States"), 7, 18 (1914) (hereinafter cited as "1914 Sen. Doc."); Herring and Gross, Telecommunications, 1 (McGraw-Hill, 1936).

3. 1914 Sen. Doc. 19-20.

funds for the existing Government line. As a result, in 1847, the Government line was sold to private interests.^{4/} "Congress refused to provide for its continuance as a postal facility in line with a long continued policy that the means of communication, such as the telegraph, should be in the hands of private enterprise."^{5/} The entire operation of the American telegraph industry was thus in private hands, over 120 years ago, and so it has remained in its entirety -- until Mailgram.

B. 1847 - 1871.

From 1847 to 1866 there was considerable wildcat private development of telegraph service, culminating in the absorption by The Western Union Telegraph Company of a very large portion of the telegraph business of the nation.^{6/} In response to those developments, Congress passed the Post Roads Act of 1866, 14 Stat. 221, which gave private telegraph companies certain rights with respect to the public domain, subject to a few specified conditions.^{7/} One of these conditions was that they should afford priority to Government telegrams. These telegrams "shall be sent at rates annually fixed by the Postmaster General" (Sec. 2). This provision was

4. Kelly, United States Postal Policy, 59 (D. Appleton and Co., 1931). (The author was a member of Congress, a member of the Post Office and Post Roads Committee of the House of Representatives, and an author of postal legislation; 1914 Sen. Doc. 20; 19 Op. Atty. Gen. 650 (1890).

5. Kelly, op. cit. supra n. 4, 59.

6. 1914 Sen. Doc. 20.

7. Ibid.; Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. 186, 76th Cong., 3rd. Sess., Part 3, The Federal Communications Commission, App. A, 81 (continued p.

repealed in 1934 when the Act was adopted. By the terms of the 1866 statute the United States reserved to itself the right "at any time after the expiration of five years * * * for postal, military, or other purposes, [to] purchase all telegraph lines" (Sec. 3).

Focused on whether the Government should exercise this reserved right, the public and Congressional debates over Government involvement in the telegraph industry, which had begun as we have seen with the very beginning of the telegraph itself, was intensified after the enactment of the Post Roads Act of 1866. The debate centered on two formal proposals for Government participation in the telegraph. One, offered by the Postmaster General, would have required the Post Office to acquire and operate all telegraph lines as a wholly public activity.^{8/} The other, known as the Hubbard proposal, would have created a new private corporation to operate the telegraph by means of a joint operation with the Post Office Department.^{9/} This included the selfsame concept embodied in the Mailgram service authorized in this case, that is, the delivery of telegrams by mail.^{10/} After numerous hearings on many bills supporting both proposals, the House Committee approved

(continued from p. 10)
(1940) (hereinafter cited as "Monograph of Attorney General");
Herring and Gross, op. cit. supra n. 2, 210.

8. Wells, The Relation of the Government to the Telegraph, 6-8 (1873).
9. Id. at 8-10.
10. Id. at 9, 60.

the proposal made by the Postmaster General for Government ownership and operation of the telegraph by the Post Office.^{11/} In the end, however, after meticulous and detailed consideration, Congress refused to adopt either the Committee-approved bill or the Hubbard proposal. Its vote was for private ownership and operation as the national telegraph policy. Consequently, private companies, particularly Western Union, continued to operate the telegraph.^{12/}

C. 1871-1934.

Thereafter, Postmaster General after Postmaster General continued to attempt to persuade the Congress to adopt a different national telecommunications policy; and thus to permit either public ownership and operation or at least some Post Office participation in the operations of the telegraph industry. None was more vigorous than Postmaster General Wanamaker in 1889-1892.^{13/} Although he was convinced that complete Government ownership and control of the telegraph would be the optimum national policy, he recognized the hard fact that the Congress had consistently displayed a firm opposition to any such policy.^{14/} Accordingly, he

11. H. Rept. No. 114, 41st Cong., 2nd Sess. (1870).

12. The regulation of the telegraph was expanded to a limited extent in 1888 by the Government-Aided Railroad and Telegraph Act, 25 Stat. 382, which vested some regulatory authority in the ICC but only over subsidized telegraph and railroad companies. Monograph of Attorney General, 81.

13. 1914 Sen. Doc. 25-28.

14. Hearings on H.R. 3319, H. Comm. on Post Office and Post Roads, 51st Cong., 1st Sess., 1-3, 16 (1890); 1914 Sen. Doc. 32; Hearings on H.R. 3010, H. Comm. on Interstate and Foreign Commerce, 62nd Cong., 2nd Sess., 104-105 (1912).

proposed a new alternative, similar in approach to the earlier Hubbard proposal, for some Post Office participation.^{15/} Most significantly for present purposes, his was one of the historic proposals identical in principle to Mailgram.

Postmaster General Wanamaker was fully aware that his alternative required legislation. The statute he proposed directed the Postmaster General to enter into contracts with telegraph companies so that telegrams could be transmitted by wire to United States Post Offices and thereafter be delivered by letter carrier.^{16/} Wanamaker explained that the new service would be slower than ordinary telegraph, but faster than regular mail, and that in this fashion the benefits of the telegraph could be extended to persons who could not afford ordinary telegraph service.^{17/} The proposal, and its supporting rationale, are in most important particulars the same as those involved in this case. During the hearings on his proposal, Wanamaker stated that he had not yet fully investigated his idea for a joint telegram service with private businessmen -- because he did not have authority to carry on those

15. Wanamaker's proposal differed from Hubbard's primarily on the issue of the creation of a new private corporation to run the transmission phase of the telegraph. Under Wanamaker's proposal the new service could be provided in cooperation with existing wire companies. Compare, Wells, op. cit. supra n. 8, 9-10, 58-62; with Hearings on H.R. 3319, op. cit. supra n. 14, 1-7.

16. Hearings on H.R. 3319, op. cit. supra n. 14, 5-7.

17. Id. at 1, 4, 7; 1914 Sen. Doc. 25.

discussions.^{18/} Despite the most forceful and persistent efforts by Postmaster General Wanamaker to gain Congressional acceptance for this Post Office participation in the receipt, processing and delivery of telegrams, neither his proposal nor any other proposal for Post Office involvement was authorized by Congress during that period.

The absolute legal necessity of Congressional action was conveyed in an 1890 Opinion of the Attorney General, in response to an inquiry from Postmaster General Wanamaker as to his authority to make contracts with telegraph companies for the transmission of messages.^{19/} Acting Attorney General William Howard Taft pointed out that the result might be different if the telegraph were then brand new and there had been no American telegraph history.

"But when the history of the development of our telegraphic system is recalled, when it is remembered that the use of the telegraph as employed by the Postmaster General in 1845-'46 under authority of Congress was discontinued because Congress made no provision for its further use, when we consider the number, variety, and importance of the communications transmitted by its use, and when it is taken into account that private persons and corporations have been allowed for a long period to develop, extend, and control this instrumentality, the conclusion seems to be beyond argument that Congress, in clothing the Department with its existing powers, can not be held to have granted, without specifying it, the power to provide for a telegraphic system of correspondence for the public at large."

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18. Hearings on H.R. 3319, op. cit. supra n. 14, 6.

19. 19 Op. Atty. Gen. 650 (1890).

"However desirable and important the end in view may be, it would seem to be an unauthorized exercise of the executive power, therefore, to provide for and take charge of a portion of the telegraphic service and make the same an adjunct of the postal service under a contract to be made with the companies concerned, because it would be without statutory authority * * * ."20/

The Wanamaker period, because of the vigorous persistence of his proposals for some Post Office participation in the telegraph, may be viewed as the climax of the conflicts about national telecommunications policy. [It was as though the people and the Congress recognized they had made the fundamental decision and definitively marked the path for all to follow thereafter.] While succeeding Postmasters General did continue to make recommendations for legislation to authorize some Post Office participation in the telegraph, so that by 1912 it was reported that more than 70 bills had been introduced in Congress for the establishment of some operational relationship between the Post Office and the telegraph companies,^{21/} there appeared no genuine chance that any such authorization would be passed. It was recognized that Congress had made a definitive decision: the Post Office was to have no share of operation and administration of the telegraph; the telegraph was to be operated by private telegraph companies.

Even during the World War I period from August 1, 1918 to July 31, 1919, when, pursuant to express authorization by Congress, the Postmaster General exercised control of the telegraph, as well as the telephone and cable systems, he did not

20. Id. at 653, 655.

21. Hearings on H.R. 3010, op. cit. supra n. 14, 21.

separate the "original owners * * * from operation" of the facilities, but with one exception maintained in effect an order that "the companies * * * 'continue in operation in the ordinary course of business through regular channels.'" ^{22/} Similarly, the Postmaster General during that one-year period gave some consideration to the "use of postal agencies in small towns for both telegraph and telephone service," but in view of the short period of his control, discussions of the matter had not taken place. He noted in his report to Congress, however, that there was "no question of potential economies" that would eventuate from those kind of arrangements, ^{23/} and thus again laid before Congress a proposal for some union between the Post Office and the telegraph. In keeping with the legislative policy, Congress took no action on the proposal. Consistent with its basic and abiding policy determination, Congress left the telegraph in private operation.

D. 1934 to Date.

When Congress considered and approved the Federal Communications Act of 1934, it was concerned with the entire telecommunications field, including radio and telephone as well as telegraph; and it reviewed the entire national telecommunications policy and created a new agency, the FCC, to administer that

22. Report of the Postmaster General on Supervision and Operation of Telegraph, Telephone and Cable Properties, S. Doc. No. 152, 66th Cong., 1st Sess., 5, 7 (1919).

23. Government Control and Operation of Telegraph, Telephone and Main Cable Systems, August 1, 1918 to July 31, 1919, 11 (G.P.O., 1921).

policy. By that time, it was clear that the national policy in general, and certainly in the telegraph industry in particular as the product of the foregoing history, was one of regulation of private industry, definitely not one of significant Government participation in actual ownership or operation. Indeed, in the Interdepartmental Committee report on the draft which ultimately became the Act, less than a page was devoted to the considerations favoring Government involvement in the operation of the telegraph. Those who drafted and passed the Act manifestly did so with the frame of reference of fixed opposition to any Government participation as bearing impairment of and threat to private enterprise.^{24/}

In the Act Congress bestowed upon the FCC both all of limited regulatory powers previously enacted and new, much expanded regulatory powers. As noted above, certain limited powers to regulate the private telegraph industry had been vested by Congress in the Postmaster General in 1866 and in the Interstate Commerce Commission in 1888. In addition, in 1910 Congress had passed the Mann-Elkins Act, 36 Stat. 539, under which certain regulatory provisions of the Interstate Commerce Act were made applicable to carriers by wire and wire service was subjected to ICC regulation.^{25/} At this point, we are attempting to describe the position of the

24. Study of Communications by an Interdepartmental Committee, Senate Committee Print, S. Comm. on Interstate Commerce, 73rd Cong., 2nd Sess., 5-6 (1934).

25. Monograph of Attorney General, 81; Herring and Gross, op. cit. supra n. 2, 211-213; Postal-Telegraph Cable v. Tonopah and Tidewater R. Co., 248 U.S. 471, 474 (1919).

Act as a whole in the context of the historical flow of American telegraph history, for we believe the particular provisions of the Act must be applied with an eye to the scope of the Congressional policy and purpose anchored to that history; we discuss those provisions in our next major point, infra, p. 22.

In 1942-1943, the Congressional attention was again sharply directed to the telegraph industry, this time because of the imminent financial collapse of the private Postal Telegraph Company, which was then the principal competitor to Western Union.^{26/} At that time, of course, the imperative necessity of a fully effective national telegraph system was dramatically evidenced by the prevailing wartime conditions.^{27/} As so often before in American telegraph history, basically two proposals were considered by the Congress. One was for public takeover and operation of the Postal Telegraph Company, to insure an adequate telegraph service during the war and to salvage the substantial Government investment which had already been made in the Company. The other was to permit the merger of Postal with Western Union (as an exception to the antitrust laws) in the hope that such merger would enable the services and facilities being provided by Postal to be maintained during wartime.^{28/} In the course of the deliberations on these two proposals, there was necessarily

26. S. Rept. No. 13, 78th Cong., 1st Sess., 4-5 (1943).

27. H. Rept. No. 69, 78th Cong., 1st Sess., 3 (1943).

28. S. Rept. No. 13, 78th Cong., 1st Sess., 4-5, 7 (1943);
89 Cong. Rec. 342-343 (1943).

involved the fundamental policy question of whether Congress was willing to permit Government ownership or operation of a telegraph company.^{29/} In the end, as it had since almost the very first page of the pertinent history, Congress opted for purely private ownership and operation. It permitted the merger, in the Telephone and Telegraph Companies Merger Act of 1943, 57 Stat. 5, 47 U.S.C. §222. The Congressional decision in favor of private operation is all the more significant and emphatic because unusually strong considerations supporting public ownership were then reflected in the unique circumstances of the ongoing World War II and the substantial indebtedness of the Postal Telegraph Company to the Government itself.

The primary reason for rejection of public ownership or operation was the deep Congressional belief in competition, and in particular, competition between the different private telecommunications media, such as telegraph, telephone and radio, and the mail system.^{30/} This competition between public enterprise and private enterprise was deemed desirable by Congress which feared that it would be seriously undermined by Government entry into the telegraph field. The merger legislation, it was said,

29. See e.g., 89 Cong. Rec., 778 (1943), where Congressman Boren, one of the principal spokesmen for the merger legislation, said: "We are deciding here today really just one thing, one very vital, important and fundamental issue * * * whether or not we want the Government to enter this field of business in competition with private enterprise or whether we want to permit this failing company to be taken over by way of merger * * * ." See also S. Rept. No. 13, 78th Cong., 1st Sess., 5 (1943).

30. Id. at 5-6; 89 Cong. Rec., 342 (1943).

would permit "severe and effective competition" between the merged telegraph company and other media of communication, including the mail system.^{31/}

Lending emphasis to the Congressional rejection of any role for the Post Office Department in the operation of the telegraph is the fact that Congress was again asked for such participation during the hearings on the merger legislation. Secretary of Commerce Jones suggested that the Post Office rent space to telegraph companies in Post Offices.^{32/} The President of Western Union suggested that if that idea were adopted, the Post Office should be permitted to contract with the telegraph company to be its agent for "the acceptance, transmission, reception and delivery of local record communications."^{33/} This was opposed by the Union on the ground that it would have an adverse effect on telegraph companies' employees and also because of the fact that the Post Office would not give its incidental telegraph responsibilities the attention, and perhaps the secrecy, the public wanted and expected from telegraph service.^{34/} Ultimately, the Post Office reported that it experienced difficulty in working up "suitable legislative language" and requested that the suggestion be held

31. H. Rept. No. 69, 78th Cong., 1st Sess., 3 (1943).

32. Hearings on S.2445, S. Comm. Interstate and Foreign Commerce, 77th Cong., 2nd Sess., 44 (1942).

33. Id. at 107.

34. Hearings on S.2598, H. Comm. on Interstate and Foreign Commerce, 77th Cong., 2nd Sess., 128-129 (1942).

in abeyance.^{35/} No such proposal has ever been enacted. Nor is any such proposal contained in any of the leading postal reform bills now pending before the Congress.^{36/}

More recently, a Report of the Telephone and Telegraph Committees of the FCC in the Domestic Telegraph Investigation, Docket No. 14650 (1966), reaffirmed the FCC's awareness of the serious policy issues raised by any Post Office participation in the furnishing of telegraph services. The Report acknowledged the efforts on the part of the Post Office between 1869 and 1914 to obtain legislation granting it operational responsibility for the telegraph (id. at 297, n. 56), and concluded that "Public ownership, as a solution, does not appear to be justified at the present time" (id. at 299). It did suggest that "much further study" should be given to "the feasibility of utilizing rapid mail service for the final delivery of telegrams" (id. at 299-300) (emphasis added). By "rapid" the Report expressly referred to Special Delivery and ABCD Mail, neither of which is involved in Mailgram; indeed, ABCD Mail has since been abolished. There has been no such study as the Report suggested, so far as the record reveals; and in any event there is no indication that any proposals for conjunction of Telegraph Company and Post Office services could be implemented without further authorization from the Congress, as had been requested and believed required on every prior occasion such a proposal was made.

35. S. Rept. No. 13, 78th Cong., 1st Sess., 6 (1943).

36. H.R. 11750, 91st Cong., 1st Sess. ("Corporation" proposal);
H.R. 4, 91st Cong., 1st Sess. (Proposal of Chairman of the
House Committee on Post Office and Civil Service).

E. The Mandate Of History.

The mandate of this history is eloquent and unmistakable to any who will deign to hear of it. It dictates purely private operation of the telegraph industry. It proscribes Post Office participation in the operations of the telegraph industry.

The FCC shut its mind to this history. It ignored the will of Congress manifested therein; and the Post Office participation it has approved in Mailgram stands in irrepressible conflict with the national telecommunications policy maintained consistently by the Congress for over a century and a score of years. The decision below must fall under the ax of this history.

II. THE PROVISIONS OF THE ACT DO NOT CONTEMPLATE OR PERMIT ANY SUCH JOINDER OF TELECOMMUNICATIONS AND POST OFFICE OPERATIONS AS MAILGRAM.

A. The Pertinent Circumference Of The Act Is Completely Private Operation.

In accordance with the historical imperative described above, the Act is obviously entirely predicated upon private operation of the telegraph industry, and certainly does not assume or authorize any operations by the Government in general or the Post Office in particular. While this conclusion flows ineluctably from the history summarized above and the Act considered as a whole, it may also be illustrated by particular provisions.

The very definitions Congress adopted, for example, denote private operation. This case involves "wire communication"

and Congress manifestly assumed and provided that "wire communication" would be a business carried on by private common carriers. That was, of course, how it had been carried on historically and how it was being carried on when the Act became law. Accordingly, in the Act itself, "common carrier" is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire" (47 U.S.C. §153(h), p. 2a, infra), and "person" is defined to include "an individual, partnership, association, joint-stock company, trust, or corporation" (id. at (1), p. 2a, infra). It is axiomatic that "In common usage, the term ['person'] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so." United States v. Mine Workers, 330 U.S. 258, 275 (1947); United States v. Cooper Corporation, 312 U.S. 600, 604 (1941); and cases cited therein.

The new regulatory agency created in the Act, the FCC, was of course designed to and has been engaged in regulating -- not Government activities -- but business activities. The Congressional intention was to regulate the entire private wire communications business comprehensively.^{37/} Whatever areas there are for Government participation are expressly provided for and are narrowly defined cases not pertinent here.^{38/}

37. The "structure" of the Act "with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation." Carter v. American Telephone & Telegraph Company, 365 F.2d 486, 494 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). The regulatory scheme of the Act is well summarized therein at 494-495.

38. See, e.g., provisions relating to "Government owned stations" (47 U.S.C. §305), "Government stations" (id. at §323), and "Naval stations" (id. at §327).

Had Congress intended to authorize the Post Office, or indeed any Government agency, itself to participate in wire communication, it would have exercised the "Post Office and Post Roads" power expressly granted in the Constitution.^{39/} Instead, however, Congress bottomed the Act exclusively upon the Interstate Commerce power.^{40/} Congress declared the Act was "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service" (47 U.S.C. §151, p. 1a, infra) (emphasis added).

Private operation is thus the governing circumference of the Act. Congress obviously assumed it was regulating all of the wire communication which would be engaged in, and that all of what it was regulating was private business. Congress had in mind the form and substance of the telegraph and telephone business as it then existed and had virtually from the beginning existed in this country, common carriers in the form of large private corporations. Congress of course recognized that technological advance would be forthcoming, and covered wire communication however it

39. "The Congress shall have Power * * * To establish Post Offices and Post Roads[.]" Constitution of the United States, Art. 1, §8, cl. 6.

40. "The Congress shall have Power * * * To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Constitution of the United States, Art. 1, §8, cl. 3.

would develop. Cf. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). History had already richly taught how profound and swift the pace of scientific progress might be. By the same token, history had taught that private corporations were the participants in wire communication, that there was no shift in this fundament -- indeed, if anything has been demonstrated above, it is that Congress was and always had been aware of this and had deliberately selected private ownership and operation as the keystone of the structure of the American wire communications industry, likewise rejecting public ownership or operation and also any public participation or involvement therein. To permit Mailgram is thus to violate one of the most fundamental assumptions embedded in the Act.^{41/}

B. The FCC Holding That The Delivery Aspect Of Mailgram Is Not A Telegraph Function Is At Once An Amendment Of The Act And An Abdication Of FCC Responsibility Neither Of Which May Be Sustained By This Court.

In its decision, the FCC segregated the sending from the receipt and delivery functions, in its attempt to assign the Telegraph Company to one side of the legal fence and the Post Office to the other. The Commission held in pertinent part, "it is manifest that the portion of the service furnished directly by Western Union is a common carrier communication service subject to

41. The FCC Memorandum Opinion and Order disposes finally of all issues as the FCC sees them relating to Mailgram and is thus complete and final approval. Isbrandsten Co. v. United States, 93 U.S.App.D.C. 293, 211 F.2d 51 (1954), cert. denied sub nom. Japan-Atlantic and Gulf Conference v. United States, 347 U.S. 990 (1954).

our jurisdiction. * * * So far as the authority of the Post Office to participate in this service is concerned, we feel that this is a matter for the agency to resolve, and that the Commission should take no position with respect thereto" (App. 73). By unmistakable implication, the FCC holds that the portion of the service furnished by the Post Office is not a common carrier communication service subject to its jurisdiction. The FCC seems to be assuming that the identity of the person providing the service, rather than the nature of the service, is pertinent to the decision as to whether that service is subject to the Act.

The Act plainly refutes the FCC. Plain and express are the statutory terms which define the jurisdiction of the FCC in terms of the physical activities involved, and embraces receipt and delivery identically as transmission. "Wire communication" or "communication by wire," according to 47 U.S.C. §153(a), p. 1a, infra, "means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (emphasis added). The FCC attempt to define the coverage of the Act by the identity of the carrier, and to segregate between sending, on the one hand, and receiving and delivery, on the other, is thus in utter disregard or defiance of the plain and unambiguous terms and intentions of the Act. The FCC amends the

Act and obviates its responsibilities under the Act. It may lawfully do neither.

In practical fact, the Post Office activity in Mailgram falls within the statutory definition of "communication by wire." In Mailgram the Post Office is patently engaged in the "receipt, forwarding, and delivery" of "wire communications" incidental to the transmission of such communications.^{42/} [That objective fact in the real world is of course not one whit altered by the FCC refusal to face that fact. Its incantation of the semantics of the statute has no power to bewitch the facts or transform the self-evident legislative intention and expression.]

In the eyes of the law, Congress obviously assumed in the Act, for reasons heretofore discussed, that the "common carriers" subject to the Act would be purely private businesses and that there would be no Government agency operating within the regulatory ambit of the Act. Furthermore, Congress obviously intended that the regulation of communication activities authorized

42. Indeed, Mailgram requires physical connections, wire connections, between the Telegraph Company and the Post Office. Ordinary postal receipt, forwarding and delivery of mail is, of course, not incidental to the transmission of sounds by wire. The Telegraph Company is certainly not standing in the shoes of the ordinary user of the postal service, as it does when it mails telegrams itself. There is not the slightest suggestion on this record that the Post Office is providing for any other party the services it is now providing for Western Union in Mailgram.

The physical wire connection required for Mailgram is in plain violation of the Act for two reasons spelled out in the provisions of §201. First, that Section provides that the carrier shall itself provide the service, subject only

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in the Act should be complete and comprehensive. The FCC now stands the Congressional intention on its head. It excludes from regulation communications services which Congress intended to have regulated -- on the ground that they are being carried on by a person who was not intended to carry them on under the Act. If "Alice in Wonderland" were a loose-leaf service, the decision below would surely be inserted as a lead case.

While the FCC flouting of the Act would be egregious whichever Government agency was involved, it is exacerbated by the fact that the Post Office is the agency engaging in telegraph operation. Certainly the Postmaster General is the one Cabinet officer who has no place in the telegraph industry, not only by virtue of the historical mandate directed specially against him, but also by the express provision of the Act itself. As the historical review above demonstrates, prior to the Act, the Postmaster General did have a regulatory function over the telegraph

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to its right to establish physical connection with other carriers subject to the Act (id. at (a)) or to exchange services with other common carriers (id. at (b)), the legislative history showing this refers to railroads, see 78 Cong. Rec. 10313 (1934), cf. Postal Telegraph-Cable Co. v. Tonopah & Tidewater R.R., 248 U.S. 471 (1919)); and the Post Office is neither a carrier subject to the Act nor a common carrier in the traditional railroad sense. Second, an FCC hearing and an FCC finding such action is necessary or desirable in the public interest are statutory prerequisites for a connection; and no such hearing has been held nor any such finding made. This is certainly not an exchange of services; Mailgram involves no telegraph service for the Post Office.

industry with respect to rates for Government telegrams. This function, together with the regulatory functions already established by Congress and assigned by it to other agencies, were consolidated in the FCC. So far as the Postmaster General was concerned, Congress expressly provided in the Act that he was to play no further part in the performance of the telegraph industry. Section 601(b), p. 13a, infra, provides, "All duties, powers, and functions of the Postmaster General with respect to telegraph companies and telegraph lines under any existing provision of law are imposed upon and vested in the Commission." When the Act became law in 1934, therefore, the Postmaster General had no "duties, powers, and functions" whatever "with respect to telegraph companies and telegraph lines". There has been no subsequent provision of law which provided such authorization or participation. The FCC disregarded this Section duly enacted by the Congress simply by declining altogether to consider the legal status of the Post Office in Mailgram. But the bedrock reality remains that Congress intended the Post Office to have no function whatever in telegraph operation.

In approving Mailgram the FCC thus clearly contravenes the Congressional intention expressed in the Act. Congress provided for private operation of the telegraph subject to comprehensive regulation. This FCC Order sanctions Post Office operation and abdicates all regulation of the wire communications services now permitted to be performed by the Post Office. The FCC has cavalierly put the cart before the horse, asserting the Act does

not cover what the Post Office does in Mailgram because the Post Office is doing it, when Congress obviously provided that only private wire common carriers should be performing these receipt, forwarding and delivery services, and in any event that all such services should be subject to regulation. An FCC Order in such total war with the Act as Congress had written and enacted it cannot survive judicial review.

III. POST OFFICE PARTICIPATION IN MAILGRAM IS NOT AUTHORIZED BY THE POSTAL LAWS OF THE UNITED STATES AND MAILGRAM IS THEREFORE UNLAWFUL.

The national telecommunications policy was discussed in the first point of our Brief, demonstrating that Congress had clearly decided to maintain the telegraph and postal systems as two distinct and indeed competing systems, the telegraph to be privately owned and operated subject to administrative regulation, the Post Office to have no participation whatever in the operation of the telegraph. In consonance with this national policy, the Federal Communications Act, as we established in our second point, was indeed predicated upon private operation of the telegraph and certainly does not authorize or permit Post Office participation in telegraph operation. As the other side of this medallion of the national telecommunications policy, we now discuss the postal laws of the United States, and demonstrate that they do not authorize or permit the Post Office participation in

Mailgram.^{43/} Title 39 of the United States Code governs the postal service and demonstrates that Congress confined the authority and functions of the Post Office strictly to those traditionally regarded as postal.

On its face, Title 39 is a most detailed and meticulously drafted statute. The grants of authority to the Post Office Department are among the most sharply defined and rigidly circumscribed in the law. The reason for this is not hard to imagine. Throughout American history, the postal system and postal appointments have been intensely political in nature. Questions such as Post Offices location, for example, obviously generate the most sensitive and intense of political feelings and considerations, resulting in a generality of Congressional interest and a closeness of Congressional scrutiny possibly unequalled by any other Title of the United States Code.

This conclusion is demonstrated by many particular provisions of Title 39. Section 507, for example, authorizes the Postmaster General to prescribe fees for particular mail services

43. Seeking an injunction against the Postmaster General, who is of course not a party herein, Petitioner on January 19, 1970 instituted an action, United Telegraph Workers, AFL-CIO, Plaintiff v. Winton M. Blount and The Western Union Telegraph Company, Defendants, Civil Action No. 148-70, in the United States District Court for the District of Columbia. The Answers have not yet been filed. Beyond the claim that the Post Office was acting beyond its authority in Mailgram, the Complaint asserted claims with respect to Mailgram against both defendants for acting unlawfully in concert and for executing and implementing a contract void as against public policy, and a claim against the Company under §214.

for example, the registry of mail, certified mail service, special delivery, the return of undeliverable letters and parcels to the sender and the issuance of a permit for prepayment of postage without stamps. All relate to the mail. Congress has authorized the Postmaster General to establish and discontinue Post Offices, with certain specified local exceptions (§701), and has specifically regulated where branch Post Offices and stations may be established (§705). Congress has enacted such detailed provisions as requiring that Post Office box rent shall be paid in advance on a quarterly basis (§708(a)) and defining the hours within which each mail must be made up (§710).

The contracting authority of the Postmaster General is meticulously regulated, Congress specifically authorizing and setting out the terms and conditions of the contracting authority, with respect to purchase of supplies (§2003), envelopes and other supplies (§2004), money order supplies (§2005), rental of equipment and services (§2006), purchase of motor truck parts (§2007), hire of vehicle from employees (§2008), delivery of special delivery mail (§2009) and postal stations (§2011). The authority of the Postmaster General to enter into leases and related contractual arrangements for Post Office premises is likewise regulated in detail (§§2102-2115). It seems crystal clear that any authority to contract with respect to the telegraph, had Congress intended to convey any, would have been expressly provided.

Likewise, had Congress intended to establish or authorize a new class of mail service -- and Mailgram is admittedly a new type of communications service employing the mails -- it would have so provided expressly. The historical establishment and existence of the classes of mail is expressly acknowledged (§2301(4)). Moreover, Congress has rigidly regulated the classes of mail, first class mail (§§4251-4254), air mail and air parcel post (§§4301-4305), second class mail and controlled circulation publications (§§4351-4370, 4421-4422), third class mail (§§4451-4453), fourth class mail (§§4551-4555) and miscellaneous matter within the various classes (§§4651-4654). In identical detail Congress has regulated the special services, registry, insured and C.O.D. service (§§5001-5013), the money order system (§§5101-5105), the postal savings system (§§5201-5224), the various delivery and transportation services (§§6001-6009), authorization to transport the mail (§§6101-6107), transportation of mail by railroad (§§6201-6215), transportation by air (§§6301-6305), highway Post Offices (§§6351-6355), and transportation of mail other than by rail, air or highway Post Office (§§6401-6440).

Each and all of the provisions of Title 39 and any other postal laws will be searched in vain for any authority whatever for the Post Office to enter into any relationship with any telegraph carrier for the delivery of telegrams such as approved below. As is made pellucid by the history of proposals which relate the postal to the telegraph service set out above, this lack of Post Office authority to embark on telegraph operations

is hardly the product of inadvertence; quite to the contrary, it is the embodiment of conscious, deliberate public policy adopted and maintained by the Congress to keep the two, postal service and telegraph service, apart and separated one from the other. Congress plainly intended that the Post Office have no such authority to participate in the telegram process as the FCC has presumed to approve in this case.

The Company conceded before the FCC that a permanent implementation of Mailgram might require Congressional authorization, but defended this particular proposal as "experimental" and thus now authorized under 39 U.S.C. §504(a) (App. 59) (emphasis in original). That Section provides in pertinent part, "The Postmaster General shall maintain in the Department a research and development program, including investigations and studies, for the purpose of introducing or improving equipment, supplies, methods, procedures, means, and devices used in the Department in order that its business may be more efficiently and economically operated" (emphasis added). There are at least three fully but independently dispositive responses to any contention that the Order below may be sustained by §504(a).

First of all, the FCC itself did not refer to the Section. Indeed, as we have seen, it absolutely refused even to consider any question relating to the authority of the Postmaster General. The only reference to §504(a) below was written by the Company, and certainly not the FCC. On this review, therefore, the Court does not properly have before it any §504(a) issue inasmuch as the Commission perceived none. As this Court

declared in H & B Communications Corporation v. FCC, D. C. Cir. No. 22,685, decided November 13, 1969, slip op. at 7, "In reaching our conclusion, we must accept the basis upon which we understand the Commission itself decided the case, rather than as it is now somewhat differently presented to the court. Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 87 (1943); National Labor Relations Board v. Metropolitan Life Ins. Co., 380 U.S. 430, 443-44 (1965); WAIT Radio v. FCC, D. C. Cir. No. 21,689, decided June 24, 1969, slip op. at 9."

Moreover, the Company candidly conceded below that Mailgram is intended to "improve Western Union's viability and its ability to compete in the communications market" (App. 61) (emphasis added). By virtue of this concession, Mailgram obviously does not fall within the requirement of §504(a) that all activities of the Postmaster General thereunder be for the purpose of operating the Post Office more efficiently and economically. ^{44/}

Finally, administrative powers are not released from any conditions and limitations which Congress has placed upon them merely by denominating them "research and development." Especially in a case where the national policy in favor of separation of private telegraph from the Post Office has been as deliberately adopted and consistently maintained as it has been in this case, it obviously extends to all powers of the Postmaster General and the FCC. Neither has any authority to violate or abolish that

44. H. Rept. No. 421, 81st Cong., 1st Sess., 2 (1949);
S. Rept. No. 1158, 81st Cong., 1st Sess., 119 (1949).

policy inasmuch as both are circumscribed by it. Violation of law and the Congressional intention is nonetheless violation of law and the Congressional intention even if carried on under the rubric of experimentation or research and development.

IV. ASSUMING ARGUENDO THAT SOME CONJUNCTION OF TELEGRAPH AND POSTAL OPERATIONS SUCH AS MAILGRAM IS AUTHORIZED AND PERMISSIBLE, THE ORDER BELOW MUST STILL BE SET ASIDE FOR FAILURE OF THE FCC TO COMPLY WITH THE PROCEDURES AND STANDARDS OF THE ACT, GIVE ADEQUATE CONSIDERATION TO PERTINENT ISSUES, HAVE ADEQUATE FOUNDATION IN RECORD FACT FOR ITS FINDINGS, OR EXPRESS EITHER ITS FINDINGS OF FACT OR ITS CONCLUSIONS OF LAW WITH SUFFICIENT SUPPORT, PRECISION OR CLARITY.

In the prior portions of this Brief, we have attempted to demonstrate that Congress made a deliberate selection of national telecommunications policy, to maintain as separate and distinct the telegraph operation, in private hands, and the postal operation, in the Post Office; and that Congress provided no authorization for any combination of the two such as Mailgram in either the Act or the postal laws. If we are correct in any of these contentions, the Order below must be set aside as beyond the authority of the FCC. But, arguendo, even if we should be in error as to all of them, even if the approval of some combination such as Mailgram is not violative of the national telecommunications policy, is authorized and permissible under the Act, and also under the postal laws, the particular Order below cannot be sustained because of the utter lack of factual foundation or adequately articulated reasons for the conclusions imported therein.

A. The FCC In Effect Issued A Certificate Of Public Convenience And Necessity Without Complying With The Act.

The reality that Mailgram is a brand new type of communications service is conceded by both the Company and the FCC. Certainly to contend that it is some sort of reasonable extension of either the previously existing telegraph service or the previously existing postal service "is to urge that new is reasonably in accord with old." Sea-Land Service, Inc. v. Connor, D. C. Cir. No. 22,140, decided June 4, 1969, slip op. at 11. To permit any such unprecedented communications service to gain FCC approval and become legally effective without any hearing or adequate record betrays the fundamental purpose and structure of the Act prescribing comprehensive regulation of all wire communication services. Even if there were no particular provisions of the Act or particular factual issues demanding a hearing, the fact that Mailgram is such a radical departure from previously subsisting national telegraph policy and practices renders both a hearing and an adequate factual record imperative under the Act. The manifest absence of both is so plainly arbitrary and excessive of the FCC's authority as to impel the setting aside of this FCC Order.

Apart from the entire general purpose and scheme of the Act, the particular provisions and procedures which were

intended to be applicable when any wire communications service is proposed are the procedures applicable to any "new line" -- defined as "any [new] channel of communication,"^{45/} p. 10a, infra -- set forth in 47 U.S.C. §214. A carrier may not construct any new line without a certificate of public convenience and necessity from the FCC. Cf. General Telephone Co. of Cal. v. FCC, --- U.S. App.D.C. ---, 413 F.2d 390 (1969), cert. denied, 90 S. Ct. 173, 178 (1969). In form, there has been no such certificate. In law, by virtue of the objective facts of the new Mailgram service and its now having been instituted as a consequence of this FCC action, the Memorandum Opinion and Order below constitutes such certification.

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45. As originally enacted in 1934, §214 did not contain a definition of the word "line" for purposes of determining what constituted a "new line" or "an extension of [a] line" under the licensing requirements of that Section. In 1943, during the deliberations on the Telephone and Telegraph Companies Merger Act, (discussed p. 19, supra) the carriers asked that a definition of the term be added to §214 to restrict the concept of a "line" to new physical wires, cables and poles as would be constructed or operated in territory not already served by them. Hearings on S.2445, S. Comm. on Interstate Commerce, 77th Cong., 2nd Sess., 72-75, 104-105 (1942). The FCC, however, took the position that the definition "should be broad and comprehensive," and should take into account the possibility of "development of the art" in the telegraph and telephone fields. Hearings on S.2598, H. Comm. on Interstate and Foreign Commerce, 77th Cong., 2nd Sess., 184 (1942). Congress rejected the carriers' plea for a narrow definition and accepted the FCC position that the definition should be broad. The then Chairman of the FCC had testified as follows in the Congressional hearings: "The notion that the Commission will have nothing to say as to the quantity of facilities and the quantity of services in a given area is repellant"; the FCC, he said, should not abandon "to the discretion of the companies as to what they will do in particular areas." Hearings on S.2445, S. Comm. on Interstate Commerce, 77th Cong., 2nd Sess., 262 (1942).

On its face, that certification is unsustainable for its failure to support its conclusions with any factual foundation or discussion of the issues involved. We will discuss some of the particular issues involved below; but at this point we rely upon the inadequacy on its face of the decision below. For we believe the FCC in this case has plainly violated "the principle that an agency or commission must articulate with clarity and precision its findings and the reasons for its decisions." WAIT Radio v. FCC, D. C. Cir. No. 21,689, decided June 24, 1969, slip op. at 5. It is one thing if this Court can satisfy itself the FCC "gave * * * a hard look." Pike's Peak Broadcasting Company v. FCC, D. C. Cir No. 22,023, decided March 24, 1969, slip op. at 18. It is quite another if it is evident the FCC certainly did no such thing; but rather seemed to be merely rubber stamping the Telegraph Company's desires.

From formal Company proposal of this radically new telecommunications service to full FCC approval consumed one month. The FCC Order was adopted but two days after the Company Reply, and also a Union Response, was filed. "The brief time span allotted must also be taken into account." Marine Space Enclosures, Inc. v. Federal Maritime Commission, D. C. Cir. No. 22,936, decided July 30, 1969, slip op. at 14. Here no reason was or can be cited why time should have been considered of the essence.^{46/} Cf. Sea-

46. The Reply to the Union's Petition to Suspend, filed by Western Union on December 29, 1969, did not take the position that time was of the essence, or that full FCC investigation and careful deliberation would in any way prejudice it or
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Land Service, Inc. v. Connor, D. C. Cir. No. 22,140, decided June 4, 1969, slip op. at 8-9. "Here," moreover, "the initial papers exposed issues of substance, issues of such obvious gravity that the Commission should not in any event need prompting from private parties before it holds a hearing." Marine Space Enclosures, Inc. v. Federal Maritime Commission, supra, at n. 27.

Furthermore, this FCC Order which is in legal effect a certification of public convenience and necessity for a new channel of communication under §214 must be set aside for manifest failure to comply with the procedural prerequisites of that Section. Pursuant thereto, the Company must file an application for such certification, but the Company submission in this case was not so designated but was filed under the guise of a tariff application.^{47/} Moreover, when it has an application to build a

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the implementation of Mailgram (see App. 55-65). In its Responding Memorandum filed the same day, the Union called this fact to the attention of the FCC, stating that Western Union's "Reply provides no reasons whatsoever for any Commission refusal to take the time carefully to consider these fundamental issues. Absolutely no reason is given why the proposed service must take effect on January 1, 1970, in a haste which would preclude full consideration, rather than only a few months thereafter, after a hearing and full consideration of all the issues could be had" (App. 66). Nonetheless, the FCC adopted its decision approving Mailgram only two days later (App. 72).

47. The tariff filing provisions of the Act (47 U.S.C. §203, p. 4a, infra) are manifestly addressed to already established communications systems -- a carrier is required to file "schedules showing all charges * * * between * * * points on its own system and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, * * * and showing the classifications, practices, and (continued p. 41)

new line or channel of communication, the FCC must serve "the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such [new] line is to be constructed, extended, acquired, or operated * * * with the right to those notified to be heard" (47 U.S.C. §214(b), pp. 10a-11a, infra). It is clear that the FCC did not comply with §214 although granting the Telegraph Company the right to institute new channels of communication which Congress certainly provided no wire carrier could lawfully have without full compliance with that Section.

Had the FCC given more adequate consideration to the case -- if it had held a hearing, developed a record, studied the positions of the parties and the realities of Mailgram, or attempted to elucidate reasons for approval of Mailgram -- it would have reached the opposite result. Its failure to do so, which should vitiate this Order, is demonstrated by its glaringly inadequate discussion of issues at the very core of this case.

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regulations affecting such charges" -- and is not designed or available to be used by a carrier to establish an admittedly new communications system, any more than to create new points on its own or any connecting systems of a carrier or a new through route. These matters are covered by other Sections of the Act, 201 and 214 in particular, the latter governing the establishment of a new system of communication, which is the reality of the carrier action in instituting the innovation of Mailgram. It is and must be the reality which governs, so that the new Mailgram system must be measured against §214 covering new systems, and not the labelling selected by the carrier. Of course the carriers would always prefer the do-it-yourself tariff procedures (tariffs become law as filed unless there is subsequent FCC action) to the route of prior FCC approval and certification. Congress provided otherwise.

B. The FCC's Failure To Consider Whether Mailgram Violated The Postal Laws Requires That This Order Be Set Aside.

The FCC, as we have seen, absolutely refused to consider whether or not Mailgram violated the postal laws. It did not assume or conclude that the Post Office had the lawful authority to carry out its part of Mailgram, any more than it assumed or concluded that the Post Office lacked such lawful authority. The FCC simply treated this issue going to the fundamental legality of the entire proposal before it as though the issue did not exist. Such an attempt to sweep an elephant under the rug is hardly sustainable administrative procedure.

To sustain this FCC Order is to lend the imprimatur of this Court to the proposition that an administrative agency may approve a new system of operation by the industry it was designed to regulate without any regard whatever to whether that new system is entirely legal.

"A regulatory agency may, should, and in some instances must, give consideration to objectives expressed by Congress in other legislation, assuming they can be related to the objectives of the statute administered by the agency." City of Chicago v. Federal Power Commission, 128 U.S.App.D.C. 107, 113, 385 F.2d 629, 635 (1967), cert. denied sub nom. Public Service Commission of Wisconsin v. Federal Power Commission, 390 U.S. 945 (1968) (footnotes omitted). To be sure, the FCC has jurisdiction only over the communications and radio industries pursuant to the

policies established by Congress in the Act. "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot without more ignore the latter."

McLean Trucking Co. v. United States, 321 U.S. 67, 80 (1944).

"Indeed we have stressed that such an accommodation does not authorize the agency in question to ignore the anti-trust laws [or similar basic legal issues posed by statutes other than the agency's own]." Federal Maritime Commission v. Aktiebolaget Svenska Am. L., 390 U.S. 238, 245, n. 4 (1968). The absolute ignoring of the prime legal issue of the authority of the Post Office supports the setting aside of this Order.

C. The FCC Failed To Give Any Adequate Consideration To The Effect Of Mailgram On Competing Communications Systems.

As a totally new telecommunications system, Mailgram is patently bound to have substantial impact upon existing and competitive communications systems. As a new system proclaiming itself as a combination of both the straight telegram and the first class mail services, moreover, Mailgram obviously will have its greatest competitive impact upon those particular communication services. The Union expressed in its Petition to the FCC its judgment that the Telegraph Company intends to eliminate the public message telegraph business and that Mailgram is in ultimate reality only a step toward this goal (App. 45-46). If given an adequate opportunity to present the facts, cf. Marine Space

Enclosures, Inc. v. Federal Maritime Commission, loc. cit. supra, and particularly if the FCC should conduct an investigation or afford genuine consideration to this development, this judgment would gain support in facts of record. The FCC failure adequately to consider the impact on existing competitive telegraph and other communications services militates for setting aside the Order.

In addition, the FCC certainly failed to consider the impact of Mailgram upon the mail service itself. So notorious are the facts that the national postal service is inefficient, eccentric and undependable, is subject to intense and increasing public criticism, and is getting worse, that this Court may certainly take judicial notice of them. It seems self-evident that assigning the Post Office an additional task can only impair the postal situation further.^{48/}

The FCC gave no adequate consideration to the substantial likelihood if not certainty that Mailgram would injure the public interest by reducing effective competition in telecommunications service, particularly from the mail and from the normal telegraph service. The FCC certainly had no such right thus to disregard or derogate the competitive effects of its actions. "[I]n the common carrier field * * * 'competition is a relevant factor in weighing the public interest.'" Carter Mountain

48. It is obvious that "A [postal] clerk cannot be assorting the mails and receiving telegrams at the same time; the two functions will unavoidably interfere with each other." Report of House of Representatives Committee on Post Offices and Post Roads (1869), as quoted in Wells, The Relation Of The Government To The Telegraph, 45 (1873).

Transmission Corp. v. FCC, 116 U.S.App.D.C. 93, 96, 321 F.2d 359, 362 (1963), cert. denied, 375 U.S. 951 (1963); Northern Natural Gas Co. v. Federal Power Com'n., 130 U.S.App. D.C. 220, 228, 399 F.2d 953, 961 (1968). The failure of the FCC adequately to consider the effects of Mailgram on competition is a further signal that this Order should be set aside.

D. The FCC Failed To Consider The Discriminatory Aspects Of Mailgram.

The Union alleged that Mailgram might be discriminatory because other carriers had been denied any opportunity for similar relationships with the Post Office (App. 48-49). All that the FCC had before it was the proposal for Mailgram. The FCC had conducted no investigation, had held no hearings about Mailgram. The record provides no basis for any factual statements about the extent to which either the Telegraph Company or the Post Office had given any notice of knowledge of their intention to seek FCC approval for Mailgram.

In the light of these conspicuous characteristics of the record, the response of the FCC to the Union allegation of possible discrimination is astonishing. The FCC simply asserted that there had been no "indication that any other carrier wishes to furnish a similar service" (App. 74). How could any such indication have possibly been given? No other carrier need have had any notice either that the Post Office was willing to enter into any such arrangements, contrary to its entire previous history, or that the FCC was available to approve any such arrangement.

To the extent that other carriers would reach the same legal conclusions we have, they would surely assume, for the reasons already discussed, that the Post Office could not lawfully enter into any such arrangements and the FCC could not properly approve them.

E. The FCC Failed To Adequately Consider The Impact Upon Employee Job Security.

The FCC also summarily dismissed the Union's contention that Mailgram would have an adverse effect upon the job security of the Telegraph Company employees. On this point the FCC asserted, "It would appear that to the extent the new service will accomplish its objective of generating new traffic on a profitable basis, the opposite result may ensue" (App. 74). This is a truism, not a finding of fact. No factual investigation or hearing having been held, there is transparently no factual support whatever for suggesting that "new" traffic will be generated, any more than that "no new" traffic or "only a diversion of the old" traffic. The FCC could as well have asserted: "It would appear that to the extent the new service will not accomplish its alleged objective of generating new traffic on a profitable basis, either because it will generate no significant amount of new traffic, or, more likely, because much if not most of any new Mailgram traffic will simply reflect a diversion from and a reduction in existing telegraph traffic, there will be grave and adverse impact upon the job security and morale of Western Union employees, injurious to the maintenance of normal telegraph service in this

country and therefore manifestly harmful to the national interest and the purposes of the Act."^{49/} The record is inadequate to support any assertion such as this or the one mustered by the FCC, precisely for the reason that the FCC treated this entire matter as a theoretical exercise in semantics rather than a practical task in administrative investigation and fact-finding.

To the extent that the instant record supports either assertion, it supports the Union's position that Mailgram must necessarily result in an impairment of job security. For the Company itself found it necessary to acknowledge that any increase in demand for the new service might be no more than a corresponding decrease in demand for existing services. "The Company anticipates that MAILGRAM Service may have a derogating effect on the volumes of Overnight Telegrams, Overnight TCCS-MS Service and Tel(T)ex Service. On the other hand, to the extent that diversion does occur, it is anticipated that the Company will be able

49. Congress has made it very clear that job security of telegraph employees is not only necessary in the public interest but also is critical for national security. Thus, in 1943, when the Telephone and Telegraph Companies Merger Act was passed (see discussion, supra, p. 19), it was observed: "We personally felt that one of the most important provisions in the bill should be the protection of employees. We have therefore gone further in this bill to protect the man who has become trained in the telegraph profession from losing his position and seniority than any legislation ever enacted by Congress." S. Rept. No. 13, 78th Cong., 1st Sess., 5 (1943). See also H. Rept. No. 69, 78th Cong., 1st Sess., at 3 (1943).

to effectuate cost savings" (Supp. App. Tab B, 10-11). There can be no doubt that what the Company refers to as "cost savings" would represent very sharp losses indeed to the employees. The Company itself went no further than holding out the hope that there might be "greater possibility of retention and addition of employees" if the service should succeed (App. 64). But the Company did not deny, as the FCC presumed to deny on its behalf, that the jeopardy to the job security of Telegraph Company employees was real and serious.

The arbitrarily short shift with which the FCC rejected this contention is emphasized by its assurance that it would give "close scrutiny to the Company's justification" for closing "public offices as a result of any diversion of service caused by MAILGRAM service" (App. 75). This is devoid of genuine substance, inasmuch as the FCC is theoretically obligated in any event under 47 U.S.C. §214(a) to scrutinize closely the closing of any of these offices. The reasons for this are, of course, service to the public and the public interest in the broadest sense, not limited at all to the interests of the employees. The diversion of business by Mailgram has little or nothing to do with it. Applications for the closing of offices are based upon the reduction in Company business and the causes of that reduction are difficult definitively to allege and to prove. The FCC gave no standards or criteria whereby it would make these judgments. In any event, before the final result of office closing, with the discharge of all the employees therein,

one or more of the employees would already have been terminated. It would tender cold comfort indeed to an employee who has already been displaced without any protection from the FCC to be advised that should his entire office be closed the FCC might be moved to take some action. There was no genuine FCC concern or consideration of the impact of Mailgram upon Telegraph Company employees. The Order below thus fails under the touchstone of the "public interest."

The FCC downgrading of employees' rights is all the more ironic in this case for two reasons. For one thing, Congress has manifested its deep concern for employee rights in many ways. In particular, it has expressed this policy in §222 of the Act, in the particular context of the Postal Telegraph-Western Union merger where it anticipated some employees would be discharged because their work would be duplicative and thus no longer required. The other consideration is that in this case the work of processing, routing and delivery will still be required and will still be performed. The Company employees whose job security is impaired by Mailgram will not be redundant employees from the viewpoint of the national economy. Their work will be transferred from the private to the public sector. It will be performed by employees of the Post Office Department. The taxpayer will be paying the bill now paid by Western Union consumers. Public operation will finally have carried the day over private enterprise, albeit Congress will never have spoken for

any modification of its entrenched policy in support of private operation of the telegraph.

F. The FCC Opinion And Order Cannot Survive
Judicial Review.

While the foregoing discussion cannot exhaust the entire complex of the serious ramifications of this FCC Order and Opinion, it should provide sufficient illustration of how overwhelmingly the Commission has failed in this case to fulfill its fundamental responsibilities and duties to determine the "public interest" on the basis of well supported and clearly articulated findings of fact and conclusions of law. The FCC again requires the admonitions of this Court that "[w]hen Congress requires a finding [of public convenience and necessity], its instruction is not to be ignored or given only lip service" (Joseph v. FCC, --- U.S.App.D.C. ---, 404 F.2d 207, 211 (1968)); that ultimate FCC conclusions may not rest upon a recital of "findings of ultimate fact alone," but must include "the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred" (Saginaw Broadcasting v. FCC, 68 App.D.C. 282, 96 F.2d 554, 560-561 (1938), cert. denied sub nom. Gross, et al. v. Saginaw Broadcasting Co., 305 U.S. 613 (1938)); and that "in order for a court to exercise in any meaningful way its function of review, it is necessary that the Commission state specifically the basis for each of its conclusions" (West Michigan Telecasters, Inc. v. FCC, 130 U.S.App.D.C. 39, 42, 396 F.2d 688, 691 (1968)).

CONCLUSION

This FCC Order sanctions unprecedented and unmis-
takable transgression against the national telecommunications
policy of separation of private telegraph operation from Post
Office participation which has been long established and consis-
tently maintained by the Congress. That policy is reflected in
both the purposes and provisions of the Communications Act of
1934 which circumscribe the power of the FCC and the postal laws
of the United States which circumscribe the power of the Post
Office. Accordingly, the Order below must be set aside and its
implementation enjoined. Alternatively, even if the FCC should
have the power to approve such a joinder of Telegraph Company and
Post Office operations as Mailgram, this Order could still not be
sustained, for the failures of the FCC specified herein to follow
the procedures or comply with standards of the Act; and the imple-
mentation of Mailgram should be enjoined unless and until there is
compliance with §214 of the Act, and the FCC, after full hearing
and consideration, has adequately firm foundations and clear and
precise reasons for making the requisite "public convenience and
necessity" and "public interest" findings and conclusions.

For the reasons stated herein, this FCC Order should
be set aside.

Respectfully submitted,

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STATUTORY APPENDIX

The following are the pertinent sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 et seq.:

"§151. Purposes of chapter; Federal Communications Commission created

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

"§153. Definitions

"For the purposes of this chapter, unless the context otherwise requires --

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and

sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

* * *

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

"(i) 'Person' includes an individual, partnership, association, joint-stock company, trust, or corporation."

"(j) 'Corporation' includes any corporation, joint-stock company, or association."

"§201. Service and charges

"(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions

of such charges, and to establish and provide facilities and regulations for operating such through routes.

"(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."

§202. Discriminations and preferences

"(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

"(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

"(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$500 for each such offense and \$25 for each and every day of the continuance of such offense."

"§203. Schedules of charges; filing with Commission;
changes in schedules; overcharges and rebates;
penalty for violations

"(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public

inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

§" (b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

"(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

"(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense."

"§204. Hearings on new charges; suspension pending hearing; refunds

"Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such

"(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

"(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

"(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense."

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amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

"§205. Commission authorized to prescribe just and reasonable charges; penalties for violations

"(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or

collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

"(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense."

"§214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

"(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: Provided, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line

constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: Provided further, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: Provided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

"(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given

to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

"(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

"(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States \$100 for each day during which such refusal or neglect continues."

"§601. Interstate Commerce Commission and Postmaster General; duties, powers and functions transferred to Commission

"(a) All duties, powers, and functions of the Interstate Commerce Commission under sections 9-15 of this title, relating to operation of telegraph lines by railroad and telegraph companies granted Government aid in the construction of their lines, are imposed upon and vested in the Commission: Provided,

That such transfer of duties, powers, and functions shall not be construed to affect the duties, powers, functions, or jurisdiction of the Interstate Commerce Commission under, or to interfere with or prevent the enforcement of, the Interstate Commerce Act and all Acts amendatory thereof or supplemental thereto.

"(b) All duties, powers, and functions of the Postmaster General with respect to telegraph companies and telegraph lines under any existing provision of law are imposed upon and vested in the Commission."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents,

THE WESTERN UNION TELEGRAPH COMPANY,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR,
THE WESTERN UNION TELEGRAPH COMPANY

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 17 1970

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

THE WESTERN UNION TELEGRAPH COMPANY,

Intervenor

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR,
THE WESTERN UNION TELEGRAPH COMPANY

ISSUES PRESENTED FOR REVIEW

The Western Union Telegraph Company (Western Union), Intervenor herein, believes the issues presented for review to be as follows:

1. Whether the Commission erred in permitting the tariff filed by Western Union containing the rates and regulations proposed for its new MAILGRAM service, which is to be provided in cooperation with the Post Office Department, to become effective without a hearing for a two-year experimental period?

2. Whether the Commission, in issuing its order, erred in declining to pass on the Post Office's authority to participate in the proposed cooperative service?

3. Whether in the circumstances involved, Petitioner, United Telegraph Workers AFL-CIO is "aggrieved" with standing to seek judicial review?

STATEMENT OF THE CASE

United Telegraph Workers AFL-CIO (UTW), Petitioner herein, is here seeking review of the Memorandum Opinion and Order (FCC 69-1412) released by the Federal Communications Commission on January 2, 1970 (App. 72-75). In this Opinion and Order, the Commission denied UTW's petition to suspend and permitted to become effective, for a two-year experimental period, rates and regulations filed by Western Union, a common carrier subject to Commission jurisdiction under the Federal Communications Act of 1934, as amended (48 Stat. 1064, as amended, 47 U.S.C. 151, et seq.), for a new service called MAILGRAM which it proposed to offer in cooperation with the Post Office Department.

Description of MAILGRAM

Although it is intended ultimately to make the new MAILGRAM service available to the public generally if it proves feasible and viable, Western Union, on December 2, 1969, filed with the Commission proposed rates and regulations under which the new service would be available for a two-year experimental period only to Western Union's

Telex ^{1/} and INFO-COM ^{2/} subscribers in twelve designated cities in the continental United States (App. 3). The new service thus to be provided would enable these subscribers to send a MAILGRAM message to anyone in the 48 contiguous States and the District of Columbia whether or not they had a receiving teleprinter (App. 3).

Under the proposal, Western Union's Telex and INFO-COM subscribers in the twelve test cities would be able during certain specified hours to send MAILGRAM messages through teleprinters on their premises by dialing into Western Union's communications network and transmitting the message to the teleprinter in the receiving Post Office specified in the Tariff for the intended recipient of the message (App. 13, 22-29, 57; Supp. App. Tab B, p. 5). Receiving teleprinters are to be installed by Western Union in 110 Post Offices strategically located throughout the 48 contiguous States and the District of Columbia (App. 57). MAILGRAMS accepted by the Western Union computer before 7:00 p.m. local time will be placed in the first-class mail stream for next business-day delivery by the Post Office (Supp. App. Tab B, p. 6).

1/ Telex is an automatic teleprinter exchange service provided by Western Union with which each subscriber is able to send and receive record messages through teleprinters installed on his premises. Western Union has approximately 30,000 Telex subscriber stations.

2/ INFO-COM is a relatively new share-system network of limited availability designed to provide private record communication for general business operations through computer-controlled message switching and message storage and retrieval. INFO-COM is integrated with other Western Union services, so that an INFO-COM subscriber can, by means of the teleprinter on his premises, send messages automatically through the Telex, public message and Bell System TWX networks.

MAILGRAM messages received at a receiving Post Office initially will be handled manually by Post Office employees who will remove the message from the teleprinter, scan it for completeness and legibility, fold and insert in a window envelope, which would then be sealed and placed in the first-class mail stream (App. 57; Supp. App. Tab B, p. 6). From the Post Office to the destination address, the envelope containing the MAILGRAM will be handled by the Post Office as priority mail (Supp. App. Tab B, p. 6). For each MAILGRAM thus placed in the mail, Western Union is to pay the Post Office 25 cents which consists of 15 cents handling charge and the domestic air-mail postage charge (App. 62-63). It is anticipated that manual handling of MAILGRAM messages by postal employees will be substantially, if not totally, eliminated when automated equipment is developed and installed (App. 57; Supp. App. Tab B, p. 6).

The combining of the resources of the Post Office and Western Union as proposed in MAILGRAM offers possibilities of a reasonably fast and economically priced service with characteristics falling between the telegram and postal services now being offered. Acceptance and transmission over most of the route will be by Western Union, so that it will take very little time for the message to reach the teleprinter in the receiving Post Office although at a cost somewhat higher than regular mail. On the other hand, delivery will be by the mails by the Post Office, so that while this portion of the service

will be somewhat slower than telegram, it is expected to be less costly than telegram. Thus, the result of the combination is anticipated to be a service which is faster than mail, slower than telegram, but at an attractive cost to the users (App. 52-58, Supp. App. Tab B, p. 3).

MAILGRAM has, in addition, certain features, which it is believed, will appeal particularly to certain users of first-class and air-mail. The MAILGRAM format is expected to create a sense of importance and urgency, not present in first-class or air-mail (Supp. App. Tab A, p. 4). Also, MAILGRAM will offer a high assurance of next-day delivery, whereas there is no assurance when a first-class or air-mail letter will be delivered, much less that it will be delivered the next day (Supp. App. Tab A, p. 4; Tab B, p. 10). As a result, it is believed that there is a substantial market for the proposed service,^{3/} but its actual size is unknown and will, concededly, depend upon a number of possible variables (Supp. App. Tab B, p. 10).

The Purpose of Western Union's MAILGRAM Filing

Prior to the making of the instant MAILGRAM filing, Western Union and the Post Office had run extensive delivery tests. From July to December, 1969, MAILGRAMS were sent daily from Western Union's office in Mahwah, New Jersey to 15 selected Post Offices around

^{3/} Indicative of the MAILGRAM potential is the fact that if it captures one percent of the volume of the first-class mail, it could result in over 400 million messages a year (App. p. 61).

the country to determine, inter alia, the feasibility of next business-day delivery by the Post Office (Supp. App. Tab A, p. 9).

With the successful completion of the above phase of the testing, Western Union filed the Tariff here involved in order to acquire actual experience from which the size and composition of the market, the relationship between price and volume and the effect of the service upon other services being provided by Western Union could be projected. (Supp. App. Tab A, p. 11, Tab B, p. 8). In order to help develop meaningful price-volume relationships, Western Union divided the twelve test cities in two Groups (Group A and Group B) of six each,^{4/} and set the service charge portion of the MAILGRAM rate at 95 cents per message for Group A cities and 65 cents per message for Group B cities (App. 21; Supp. App. Tab B, p. 13).^{5/} In addition, six cities were designated as control cities^{6/} from which, although MAILGRAM service will not be available, Western Union expects to collect data comparable to that collected for the test cities (Supp.

^{4/} The six Group A cities are Charlotte, N.C., Detroit, Mich., Miami, Fla., Newark, N.J., Seattle, Wash., Washington, D.C. The six Group B cities are Atlanta, Ga., Boston, Mass., Cincinnati, Ohio, Dallas, Texas, Denver, Colo., Kansas City, Mo. (See App. 56; Supp. App. Tab B, p. 8).

^{5/} The MAILGRAM rate consists of two components, a service charge as mentioned in the text, and a usage charge to be computed purely on a time basis without differentiation between Group A and Group B cities (App. 20-21).

^{6/} The six control cities are Milwaukee, Wisc., New Orleans, La., Philadelphia, Pa., Pittsburgh, Pa., San Francisco, Calif., and Tampa, Fla. (Supp. App. Tab B, p. 8).

App. Tab A, p. 14, Tab B, pp. 9-10).^{7/} During the two-year experimental period, Western Union intends to collect, on a monthly basis and to the extent pertinent, detailed statistics for each of the cities involved respecting the volumes and revenues from MAILGRAM and from other services furnished by Western Union. In addition, Western Union intends to sample MAILGRAM messages in order to determine the sources and uses of MAILGRAMS such as the industry of the sender, the purpose for which the MAILGRAM was sent, the origination time, the day of week originated, the length of message, the class of Post Office at the destination, and the relationship of time zone at point of origination and destination (Supp. App. Tab B, pp. 9-10).

Petitioner's Petition
to Suspend

Alleging that it represents all of Western Union's employees in the continental United States (except a New York City unit of 3,000 employees), UTW contended that the proposed MAILGRAM service involves a fundamental and radical change in national telecommunications policy,

^{7/} In the selection of test and control cities, consideration was given to a number of factors such as the geographical dispersion of the cities, the locations of business headquarters offices that generate large quantities of mail, the number of Telex and INFO-COM stations, the level of Telex and INFO-COM usage revenues, and the level of public message service volumes and revenues. Each of the two test groups of cities contain a total of approximately 3,000 Telex subscribers. (Supp. App. Tab B, pp. 8-9).

that it is contrary to the public interest in viable and efficient telegraph communications, and that it involves the Post Office in an undertaking beyond its statutory authority. Accordingly, UTW urged the Commission to suspend the operation of Western Union's proposed MAILGRAM rates and regulations (App. 33-54).

The Commission's Order

Following the filing of a reply by Western Union (App. 55-64), and of a responding memorandum by UTW (App. 66-71), the Commission, by Memorandum Opinion and Order released January 2, 1970, denied UTW's petition to suspend and permitted Western Union's proposed MAILGRAM rates and regulations to become effective as of January 1, 1970 for the two-year experimental period requested by Western Union (App. 72-75). The Commission limited its Order to only the portion of the proposed service to be provided by Western Union since Western Union alone is subject to its jurisdiction and declined to pass upon UTW's contentions relating to the Post Office, stating (App. 73):

"So far as the authority of the Post Office to participate in this service is concerned, we feel that this is a matter for that agency to resolve, and that the Commission should take no position with respect thereto."

The Commission dismissed as "highly speculative," (App. 73), lacking in "specifics" (App. 74), or unsound (Ibid.), the several "public interest" factors advanced by UTW in support of its position. With particular reference to UTW's contention that the service would impair the job status of its members, the Commission commented that (App. 74):

"[UTW] fails to demonstrate how this result will necessarily follow. It would appear to the extent the new service will accomplish its objective of generating new traffic on a profitable basis, the opposite result may ensue."

Finally, the Commission felt that the proposed MAILGRAM service offered sufficient promise of public benefit to warrant the proposed experiment (App. 75). However, since "the effects of the service, desirable or undesirable, cannot be ascertained fully without experience" (App. 74), the Commission conditioned its action upon Western Union's filing reports as needed to forestall any undesirable effects (App. 75).

ARGUMENT

In 1962, the Commission directed its Telephone and Telegraph ^{8/} Committees to study, in the Domestic Telegraph Investigation, the deterioration in Western Union's public telegraph business and to recommend possible solutions. ^{9/} In the course of their resulting detailed report, ^{10/} the Committees, inter alia, noted (at pp. 299-300) the suggestion that since the Post Office's nationwide network of physical facilities were adaptable to the providing of public message service, the partial utilization of these facilities in connection with the delivery phases of Western Union's public message service might stimulate the record communication business.

^{8/} These Committees consisted of Chairman Hyde and Commissioners Bartley and Cox.

^{9/} See FCC Order 62-533 in Domestic Telegraph Service, Docket No. 14650, released May 25, 1962.

^{10/} Report of the Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation (Docket No. 14650) dated April 29, 1966.

Western Union and the Post Office have picked up this suggestion and have undertaken to make the studies which the Commission pointed out were needed before such a service would be made available generally. The experimental MAILGRAM service here involved is another, advanced, phase in these studies and is designed to test, through actual^{11/}experience, the practicability and feasibility of providing such a cooperative service.

UTW's petition for review seeks to block even this experimental phase of the proposed cooperative service. In support of its position that the Commission's Order should be set aside, UTW makes several contentions. On the assumption that UTW is "aggrieved" with standing to obtain review of the Commission's Order, we show below that the Commission's Order should be affirmed. Point I discusses UTW's various "public interest" contentions and shows that they are without substance or merit. In Point II, we show that the Commission properly declined to pass on UTW's claims as to the Post Office's authority and, should the Court nevertheless reach the question, that the Post Office does in fact have the requisite authority. In Point III, we show that UTW is not in fact aggrieved and for this reason, the petition for review should be dismissed.

I.

THE COMMISSION'S ORDER IS FREE OF ERROR

UTW contends (Br., pp. 36-50) that the Commission committed several errors in permitting Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period

^{11/} Emphasis supplied throughout unless otherwise noted.

12/

without a hearing and hence should be set aside. We show below that these contentions are without merit or substance so that, contrary to UTW's argument, the Commission's Order should be affirmed.

A. The Commission Did Not Abuse Its Discretion In Permitting the MAILGRAM Rates and Regulations To Become Effective Without a Hearing

Section 204 of the Communications Act, under which Western Union's proposed MAILGRAM rates and regulations were filed, plainly leaves it to the discretion of the Commission whether to "enter upon a hearing concerning the lawfulness" of filings made thereunder. See, e.g., California Public Utilities Commission v. United States, 356 F. 2d 236, 240 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966). We do not understand UTW to claim otherwise. Rather, its various arguments in this regard implicitly accept that the Commission has such discretion, and purport, instead, to demonstrate that in the circumstances here involved, the Commission abused this discretion. As shown below, far from constituting an abuse of discretion, the Commission's action was eminently reasonable and proper.

In support of its position, UTW (Br., p. 37) argues that the proposed MAILGRAM service is such a radical departure from "previously subsisting national telegraph policy and practices" and from the communications services currently being offered as to render "both a hearing and an adequate factual record imperative under the Act." In addition, UTW contends (Br., p. 41):

"Had the FCC given more adequate consideration to the case -- it it had held a hearing, developed a record, studied the positions of the parties and the realities of

^{12/} UTW's contention, that the Commission erred in declining to pass on the authority of the Post Office, is dealt with in Point II(A) infra, pp. 26-35.

Mailgram, or attempted to elucidate reasons for approval of Mailgram -- it would have reached the opposite result. Its failure to do so, which should vitiate this Order, is demonstrated by its glaringly inadequate discussion of issues at the very core of this case."

In the same vein, UTW contends (Br., pp. 43-45) that the Commission's order fails to take into account the effect of MAILGRAM upon (1) the existing competitive telegraph and other communications services; (2) the mail service itself and (3) the effective competition in telecommunication service.

1. MAILGRAM Is Not a Departure From Existing Policy or Service

One answer to these contentions is that while MAILGRAM involves a new type of service, it does not involve a departure from "previously subsisting national telegraph policy" (Br., p. 37). UTW's argument is predicated on its contention that there is a national telecommunications policy prohibiting the Post Office from participating in cooperative undertakings with Western Union. We show in Point II(B) infra, pp. 48-58, should the Court reach that question, that no such policy in fact exists, MAILGRAM obviously could not violate a non-existent policy.

Likewise, MAILGRAM does not involve a radical departure from the types of communications services previously offered by Western Union and the Post Office. To the contrary, MAILGRAM embodies an entirely reasonable combination of portions of telegraph service customarily offered by Western Union with portions of mail service customarily offered by the Post Office.

Thus, as shown in the Statement, supra, Western Union's part of the MAILGRAM package is to accept and electronically transmit the message to the city in which the receiving Post Office is located. Not only does the provision of this portion of the service by Western Union not require the construction or installation of any new facilities, but the service itself is indistinguishable from other services already available from Western Union's existing nationwide network.

Moreover, while Western Union also is to install teleprinters in each of the 110 receiving Post Offices and connect them to Western Union's system through its facilities already located in each of these cities, this involves only supplements to Western Union's already existing facilities as to which, as shown below, UTW raised no question before the Commission.

The portion of the MAILGRAM service provided by the Post Office similarly does not depart from traditional patterns. Thus, once a MAILGRAM message is received in the receiving Post Office and placed in the mail stream, the delivery by the Post Office of the envelope containing that message is indistinguishable from the Post Office's handling of any other first-class mail.

And, although Post Office personnel are to perform certain clerical tasks between the receipt of the message at the teleprinter in the receiving Post Office and the placing of the envelope containing the message in the first-class mail stream, the performance of these tasks is expected to continue only until automated equipment to do this work is developed and installed. But, in any case, there is nothing

novel or radical for Post Office employees to perform services for contractors with the Post Office. 39 U.S.C. 2203(c) expressly provides for the disposition of money collected by the Post Office for

"(3) Payments made by contractors for services performed for them by postal personnel." 13/

To be sure, MAILGRAM is the first instance in which Western Union and the Post Office have undertaken to cooperate in providing a record communications service. However, not only is the proposed service in accord with the suggestion in the 1966 Report of the Commission's Telephone and Telegraph Committee (see supra, p.8), but the combination of electronic transmission of the message and the Post Office mail service for local delivery results in a new service fitting between those offered separately by Western Union and the Post Office and appealing to those whose needs fit the particular characteristics of such a service. MAILGRAM thus is plainly not a radical departure from the type of communications service previously offered, as urged by UTW. Rather, it is a "new [service] * * * reasonably in accord with old." (See Pet. Br., p. 37). 14/

13/ See, also, infra, pp. 37-38, where this provision is discussed in greater detail.

14/ Sea-Land Service, Inc. v. Connor, ___ U.S. App. D.C. ___, 418 F. 2d 1142 (1969) (Pet. Br., pp. 37, 39-40), arose under Section 605(c) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1175(c), which expressly provides for hearing, where the subsidized service proposed is, inter alia, "in addition to the existing service or services." The new service there involved obviously fell within the statutory definition; as described by the applicant there, it was "the first fully containerized steamship service in the foreign commerce of the United States" with the application being for a subsidy to convert two ore carriers into cellular containerized ships. (, 1145).

2. The MAILGRAM Experiment Is For The Purpose of Acquiring Experience

Still a further answer to UTW's complaint in this regard is that in its order here under review, the Commission has permitted Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period for the purpose of acquiring experience by which to evaluate the various aspects of the new, untried, service. Such experience would provide the basis for making projections and estimates as to the future and thereby provide a foundation (1) for Western Union and the Post Office to decide whether they wish to provide the service on a permanent basis and (2) for the Commission to determine whether to permit Western Union to provide the service on a permanent basis.

In other words, since there is a complete absence of experience with MAILGRAM from which meaningful estimates and projections could be made, the Commission agreed with Western Union that in this instance, it would be more helpful to a determination of the viability of MAILGRAM to permit Western Union to accumulate experience on a two-year experimental basis rather than to try to evaluate the proposed service solely from estimates and studies based entirely upon a priori assumptions and premises.

The Courts have left no doubt as to the superiority of experience over a priori estimates. In Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151 (1934) the Supreme Court declined to accept findings, although supported by evidence in the record, when they were contradicted by actual experience. The Supreme Court there stated (292 U S. at 163-64):

"This actual experience of the company is more convincing than tabulations of estimates. In face of that experience, we are unable to conclude that the company has been operating under confiscatory intrastate rates * * *. Elaborate calculations which are at war with realities are of no avail. The glaring incongruity between the effect of the findings below as to the amounts of return that must be available in order to avoid confiscation and the actual results of the company's business makes it impossible to accept those findings as a basis of decision."

Similarly, in West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 79 (1935), where the local Commission had fixed the utility's rates on the basis solely of predictions and estimates to the exclusion of the Company's actual revenues and outlays, the Supreme Court reversed. In an opinion written by Mr. Justice Cardozo, the Supreme Court ruled (294 U.S. at 82):

"* * * There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. * * * But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' (citation omitted) We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.' (citation omitted). We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

The soundness of the Commission's action here follows a fortiori from these rulings of the Supreme Court. In Lindheimer and West Ohio the projections and estimates rejected by the Supreme Court in favor of actual experience had presumably been based on prior experience. Here, there is no experience, current or past, from which meaningful estimates and projections can be made. Indeed, the Commission itself expressly

recognized that "the effects of the service, desirable or undesirable, cannot be ascertained fully without experience." (App. 74).^{15/}

In a word, in light of the complete lack of any experience with MAILGRAM, the issue here is,

"* * * the kind of issue involving expert opinion and forecasts which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

"It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in light of experience." American Airlines, Inc. v. CAB, 123 U.S. App. D.C. 310, 319, 359 F. 2d 624, 633 (1966), cert. denied, 385 U.S. 843 (1966).

The above American Airlines case is of particular significance. The CAB's "policy statement" and action on a specific application, there approved by this Court despite the absence of an evidentiary hearing, pertained to experimental operations. 123 U.S. App. D.C. at 319, 359 F. 2d at 633. The Court there expressly noted (fn. 26):

"* * * In the accompanying order permitting Slick's tariff to go into effect, the Board stated: 'We believe that Slick is proposing a worthwhile experiment which should be tested in the market place * * * Permitting Slick's tariff to go into effect now will also provide the Board with experience data upon which we may better gauge the effect of the blocked space service during the course of the ensuing investigation'.
* * *"

The fact that the Commission's action operates to permit Western Union's proposed MAILGRAM rates and regulations to be effective for a limited experimental period for the purpose of accumulating experience serves also to answer UTW's further arguments (Br., pp. 39-40)

^{15/} As pointed out earlier, the Commission evinced an interest to forestall any undesirable effect which might develop and to that end, directed Western Union to keep it apprised of the progress of the experiment

that the Commission's findings are inadequate and that the Commission acted in unseemly haste in issuing the order here involved. Viewed in light of the purpose and intent underlying the Commission's action, not only was the expedition with which the Commission issued its order fully justified^{16/} but its findings are set out with sufficient clarity and precision to enable this Court to discern the path which the Commission followed in taking the action it did. See WAIT Radio v. F.C.C., ___ U.S. App. D.C. ___, 418 F. 2d 1153, 1156 (1969); Pikes Peak Broadcasting Co. v. F.C.C., D.C. Cir. No. 22023, decided March 24, 1969, slip op. p. 17; Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 595 (1945).

B. Questions Under Section 214(a) Are Not Properly Before the Court

Asserting that the Commission's action in reality constitutes the issuance of a certificate of public convenience and necessity, UTW contends that the Commission's order must be set aside for failure to comply with the requirements of Section 214(a) of the Communications Act relating to the issuance of such certificate (Br., pp. 37-39).

However, these questions were not raised before the Commission. Neither of the pleadings filed by UTW before the Commission makes any reference to any such questions. Thus, neither its Petition to Suspend (App. 33-54) nor its Responding Memorandum (App. 66-71)

^{16/} Had the Commission not acted at all, the proposed tariff would have become effective on January 1, 1970. Only by suspending a tariff, can the effective date of a tariff be postponed (See Sec. 204 of the Act).

makes any mention of Section 214(a), much less do they contain arguments based on the alleged applicability of that section to Western Union's filing here involved. Nor did Petitioner file an application for reconsideration under Section 405 of the Act urging any such claim or argument.

In these circumstances, it is well established that these questions may not be raised for the first time in this Court. See, e.g., Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 239, 230 F. 2d 204, 207 (1956), cert. denied 350 U.S. 1007 (1956); Albertson v. F.C.C., 100 U.S. App. D.C. 103, 105-06, 243 F. 2d 209, 211-12 (1957); Florida Gulf Coast Broadcasters Inc. v. F.C.C., 122 U.S. App. D.C. 250, 251-52, 352 F. 2d 726, 727-28 (1965). As this Court stated in Albertson (106, 212), and Florida Gulf Coast (251-52, 727-28), both quoting from Alaska Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 (1946):

"A reviewing Court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

In any case, it should be noted that MAILGRAM does not consist of a "new line" or of a "[new] channel of communication" within Section 214(a) as urged by UTW (Br., p. 38). Moreover, even if it did, UTW's contentions ignore (1) the proviso in that Section expressly relieving common carriers from the need for a certificate in situations involving "the construction, acquisition or operation of * * * local, branch, or terminal lines not exceeding ten miles in length * * *" and (2) Section 63.03(c) of the Commission's Rules and Regulations which provide,

subject to the filing of certain reports within 30 days "following the end of each 6-month period covered," that:

"c) Without regard to the other requirements of this part, and by application setting forth the need therefor, any carrier may request continuing authority, subject to termination by the Commission at any time upon 10 days' notice to the carrier, to commence small projects for the supplementing of existing facilities involving estimated construction and installations costs not exceeding \$15,000, or to lease and operate telephone or telegraph facilities of other companies where the rental to be paid under each such lease is not more than \$5,000 for the entire term of such lease, or if the term of the lease is for a one-year period or longer, is not more than \$5,000 on an annual basis. * * *"

Since the cities in which the receiving Post Offices are located were already tied into Western Union's existing nationwide communications network, and Western Union holds non-terminated "continuing authority" specified in Section 63.03(c) (See The Western Union Telegraph Company, Order and Authorization FCC 62M-764, issued May 28, 1962), it is apparent that UTW is seeking by an afterthought to create the appearance of an issue where none in fact exists, thereby emphasizing the soundness of the reasons underlying the rule prohibiting a Court reviewing agency action from considering questions sought to be raised for the first time before the Court.

C. The Commission's Order Is Not Discriminatory

Further attacking the Commission's order, UTW points out (Br., p. 45) that before the Commission it urged that "MAILGRAM might be discriminatory because other carriers had been denied any opportunity for similar relationships with the Post Office," and characterizes as "astonishing" the Commission's ground for rejecting that contention, i.e., that there was no indication that any other carrier wished to furnish a similar service (App. 74). "How," UTW asks, "could any such indication have possibly been

given. No other carrier need have had any notice either that the Post Office was willing to enter into any such arrangements * * * or that the FCC was available to approve any such arrangement."

Apart from the fact that UTW's reference to other carriers is unclear since Western Union is the only domestic telegraph carrier in the 48 contiguous States, there is nothing improper, much less "astonishing" in the Commission's reasoning. There is no basis for UTW's implication that Western Union had special information as to the attitude of the Post Office and of the Commission with regard to such a cooperative undertaking. Nor was the proposed cooperative undertaking a closely guarded secret until Western Union filed its application with the Commission in the instant proceeding. Long before ^{17/} Western Union made its filing herein, the Wall Street Journal carried articles, and Western Union issued press releases, dealing with MAILGRAM. In addition, on June 4, 1969, nearly six months before Western Union made its instant filing, the Postmaster General elaborated upon the plans with regard to MAILGRAM, in testifying before the House Committee on Post Office and Civil Service on Postal Reorganization, 91st Cong., 1st Sess., Tr. pp. 208-9, 230-31. See also infra, pp. 47-48.

Thus, ample information as to the MAILGRAM experiment was, as a practical matter, readily available to anyone interested in such matters well before Western Union filed its application with the Commission. In these circumstances, the fact that no other carrier opposed

^{17/} See, for example, Wall Street Journal for June 30, 1969. For the convenience of the Court, this Wall Street Journal article and a Western Union press release are set out in the Appendix. (pp. 1a - 6a).

the proposed MAILGRAM experiment before the Commission justified the Commission's rejection of UTW's argument as to possible discrimination. The Commission's conclusion in this regard is further reinforced by the fact that no such carrier has come forward since the issuance of the Commission's Order here under review.

D. MAILGRAM Experiment Will Not Impair Job
Security of UTW's Members

UTW also seeks to undercut the Commission's order by urging (Br., p. 46) that the Commission "failed to adequately consider the impact upon employee job security" in issuing its order. In this connection, UTW asserts (Br., p. 46) that the Commission's finding that "'It would appear that to the extent the new service will accomplish its objective of generating new traffic on a profitable basis, the opposite result may ensue (App. 74)' * * * is a truism, not a finding of fact" and that the Commission "could as well have asserted" that "to the extent that the new service will not accomplish its alleged objective * * * there will be grave and adverse effect upon the job security and morale of Western Union employees."

These claims of UTW are wholly unrealistic. Western Union has undertaken the experiment in order to find out whether the MAILGRAM service will be successful. If it is not, Western Union will obviously not persist in providing the service. Western Union is interested in MAILGRAM only as a successful venture and is not interested in continuing a new service which would serve only to reduce its revenues and profits. After all, the Commission's order permits Western Union

to participate in MAILGRAM for only a two-year experimental period and further Commission action will be required in order for Western Union to continue with MAILGRAM for any longer period. Should MAILGRAM be discontinued as unsuccessful, Western Union's employees will be in the same position for all practical purposes as they would have been had the experiment not been undertaken.

Should the experiment be successful, however, the Commission's finding that it probably will enhance the job security of UTW's members is more than "a truism." It is fully supported by business reality and common sense. As pointed out supra, pp. 4-5, the primary potential new market for MAILGRAM is expected to be certain users of first-class mail and air-mail. As is there shown, the MAILGRAM format is expected to provide a sense of importance and urgency, not present in first-class or air-mail. In addition, MAILGRAM will offer a high degree of assurance of next-day delivery, whereas there is no assurance when a first-class or air-mail letter will be delivered, much less that it will be delivered the next day.

Plainly, to the extent that MAILGRAM opens such new markets to Western Union, all Western Union's employees, including those represented by UTW, can only benefit. As UTW is well aware, Western Union's mere undertaking of MAILGRAM has already created a number of new jobs in Western Union's MAILGRAM Center. Indeed, in sharp contradiction to its prediction of calamity if the MAILGRAM experiment were to go forward, UTW has recently admitted that "as yet no employee has been adversely affected." (See UTW's Opposition to Respondent's Motion for Enlargement of Time, dated March 16, 1970, p. 2).

Moreover, although, as UTW points out (Br., p. 47), Western Union recognizes that MAILGRAM may have a derogatory effect upon the volumes of some of the other services offered by Western Union, it does not follow therefrom, as UTW contends (Br., p. 47) that such derogatory effect would affect the job security of UTW's members. This is in part because Telex and INFO-COM services are "do-it-yourself" services in that the communications are inputted directly by the customers (Supp. App. Tab B, p. 2) and in part because such derogatory effect, if any, would be very limited and scattered during the two-year experimental period covered by the Commission's Order.

Under the parameters of the present experiment, Western Union's Telex and INFO-COM subscribers in only 12 test cities can initiate MAILGRAM messages. These subscribers represent a comparatively small ^{18/} percentage of Western Union's total Telex and INFO-COM subscribers, which in turn represents only a part of Western Union's total sources of revenue. Plainly, therefore, the derogatory effect, if any, upon Western Union's other services of making MAILGRAM available to these subscribers would be very small. In addition, since the MAILGRAM messages sent by these subscribers would be received in any one of the 110 receiving Post Offices, such derogatory effect upon other Western Union services would be dissipated and thereby further minimized.

Also, since the Commission's Order covers only a two-year experimental period and further Commission action would be required in

^{18/} Note that the major cities of New York, Chicago and Los Angeles are not among the 12 test cities.

order for Western Union to continue with MAILGRAM, it is unlikely that Western Union would discharge, or otherwise affect the status of, any employees during this experimental period as a result of experience obtained during that period. This is particularly so since there is no assurance that Commission approval would be forthcoming even if the experiment is successful.

Finally, the Commission's order expressly manifests an intent to forestall any adverse effect upon Western Union's employees, should such be threatened as a result of the experiment. In its Order, the Commission expressly warned (App. 75):

"* * * should Western Union seek to close public offices as a result of any diversion of business caused by MAILGRAM service the Commission would expect to give close scrutiny to the company's justification for such action."

UTW (Br., pp. 48-49) attempts to belittle this Commission admonition by urging that the Commission already has a duty to pass upon Western Union's applications for permission to close offices. But UTW's argument misses the point. The Commission obviously intended its statement to indicate not only that it would give more than the usual attention to any such application during the two-year experimental period, but that it would look with a jaundiced eye upon proposed office closings which appear to be based on volume declines in Western Union's public message service due to MAILGRAM. In this regard, it must be remembered that Western Union public message business has been declining generally and as a result Western Union has been closing public offices. Should the public message business continue to decline during the experimental

period for causes other than MAILGRAM, it would be unfair to preclude Western Union from closing further offices just because it is experimenting with MAILGRAM. in an effort to find a means of offsetting that decline. It is the decline in public message business and the resulting impact upon its employees which constitutes the background for the following statement which Western Union made before the Commission (App. 64) and UTW (Br., p. 48) takes out of context:

"* * * with respect to the contentions regarding possible job security, the short answer is that new services which meet a public need and demand generate a greater possibility of retention and addition of employees than having the Company sit back and 'let the world go by'."

II.

UTW'S CONTENTIONS WITH REGARD TO THE POSTAL LAWS ARE WITHOUT MERIT

UTW (Br., pp. 8-36) devotes a substantial part of its brief to an attempt to demonstrate that the Post Office does not have authority to join with Western Union, in providing the cooperative telegram-mail MAILGRAM service contemplated by the Commission's Order here involved even on the experimental basis envisioned by that Order. In this connection, UTW recognizes that the Commission declined to pass upon its claims as to the Post Office's authority; however, UTW (Br., pp. 42-43) urges that that Commission action also constituted error.

We show in subsection A below that, contrary to UTW's contention, the Commission properly declined to decide whether the Post Office has the requisite authority and limited its ruling to Western Union's tariff filing with respect to MAILGRAM in issuing the order here involved.

In subsection B below, we discuss the question of Post Office authority solely to cover the contingency that the Court might undertake to decide that question. We there show that the Postal Laws contained in Title 39 of the U.S. Code include provisions which either expressly or implicitly vest the Post Office with ample authority to cooperate with Western Union in providing MAILGRAM service, particularly on the experimental basis covered by the Commission's order.

A. The Commission Properly Refused to Pass On
The Post Office Authority In Approving
Western Union's MAILGRAM Tariff

There is no merit to UTW's argument (Br., pp. 42-43) that when the Commission issued its order permitting Western Union's MAILGRAM tariff to become effective for a two-year experimental period, it erred in refraining from passing upon the authority of the Post Office to cooperate with Western Union in providing that service.

1. The Post Office's Portion of MAILGRAM Does
Not Include Activities Normally Subject
to Commission Jurisdiction

At the outset, it should be noted that the portion of the MAILGRAM service provided by the Post Office does not include the receipt, or electronic transmission, of messages. These functions are to remain wholly a responsibility of Western Union (Supp. App. Tab B, p. 3). The portion of the MAILGRAM service to be provided by the Post Office consists primarily of first-class mail service which traditionally has been performed by the Post Office and over which the Commission clearly has no jurisdiction.

Thus, the Post Office's responsibility with regard to MAILGRAM consists basically of delivering as first-class mail the envelopes containing the MAILGRAM messages once they have been received in the receiving Post Office and placed in the mail stream. Consequently, the Post Office's function vis-a-vis MAILGRAM is indistinguishable both from first-class mail service generally and from the first-class mail service furnished by the Post Office with regard to telegram messages placed in the mail by Western Union for Post Office delivery to the addressee.

To be sure, Post Office personnel are to perform certain clerical operations between the receipt of the MAILGRAM message at the teleprinter in the receiving Post Office and the placing of the envelope containing the message in the first-class mail stream. However, as mentioned earlier, these operations are to be performed by Post Office personnel only until automatic machines are developed and installed to do these operations. Moreover, the performance of these operations clearly does not involve "wire communication" within the definition contained in Section 153(a) of the Act. At the time these operations are performed, the transmission of the message has been completed and the message itself received at the teleprinter.

UTW's argument (Br., p. 26), that these operations come within "the receipt, forwarding and delivery of communications incidental to such transmission" as defined in Section 153(a) goes much too far. If UTW's reading were to be accepted, it would follow that the delivery by the Post Office of the envelopes containing telegraph messages placed by Western Union in the mail would likewise come within that

language. Yet, it is clear, and even UTW implicitly recognizes (Br., p. 27, fn. 42), that in such circumstances Section 153(a) is inapplicable once the message leaves the custody of Western Union and passes to the custody of the Post Office. So, also in the instant situation, Section 153(a) is inapplicable once the MAILGRAM message is received at the teleprinter in the receiving Post Office and passes into the custody of the Post Office.

2. The Commission's Jurisdiction Generally Does Not Extend to Government Telecommunications Activities

Even if the limited MAILGRAM operations undertaken by the Post Office might otherwise be regarded as coming within the ambit of the Commission's jurisdiction, the fact that they are performed by the Post Office operates to remove them from the Commission's jurisdiction. With a few minor exceptions, not here relevant, the Communications Act excludes from Commission regulation all the communications activities undertaken by the Federal Government, including the Post Office.

This is cogently demonstrated in UTW's own Brief (at pp. 22-25) where it is shown that under the Communications Act, the Commission's jurisdiction is limited to the regulation of private common carriers. While UTW (Br., pp. 22-25) attempts to infer from this circumstance that Congress intended that the Government not engage in telecommunications activities, that conclusion is totally unjustified and unwarranted. The absence of Commission jurisdiction with respect to the telecommunications activities of the Government means only that and nothing

more, i.e., that the Commission does not have jurisdiction over telecommunications activities undertaken by the Government.

Not only are radio stations belonging to and operated by the United States expressly made exempt from Commission regulation by Section 305 of the Communications Act, but the Act itself contains no prohibition against agencies of departments of the Government engaging in telecommunications activities. And since the Report of the Interdepartmental Committee apprised Congress that the Government was engaged in telecommunications activities by specifically listing several communications systems which even then were being operated by various Government agencies (See Study of Communications by an Interdepartmental Committee, Senate Committee Print, Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., pp. 5-6 (1934))^{19/}, it is apparent that Congress intended that Commission regulation should not extend to those Government activities.

The actions of both the Commission and other branches of the Federal Government have always been predicated on this construction of the Communications Act. For example, in its Tentative Decision in TELPAC, 38 F.C.C. 370 (1964) the Commission, in commenting upon the effect of its opening of microwave frequencies to privately operated systems, noted (at 382):

^{19/} Although the Interdepartmental Committee did not prepare any proposed legislation implementing its recommendation that Federal regulation be enacted, its report played an important role in the history of the Communications Act. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 8301, 73rd Cong., 2d Sess., pp. 1-3 (1934).

"* * * the U.S. Government has always been free to use its frequencies, which are not subject to the Commission's control, in any manner that it wished and thus was in a position to use 'private' microwave systems to an unlimited extent."

The Government's telecommunications systems have not only operated free of Commission regulation since the enactment of the Communications Act in 1934,^{20/} but in 1962 President Kennedy established a Director of Telecommunications Management in the Office of Emergency Planning^{21/} with the responsibility, inter alia, to

"* * * coordinate telecommunications activities of the executive branch of the Government and be responsible for the formulation, after consideration with appropriate agencies, of overall policies and standards therefor." ^{22/}

Plainly, therefore, even if it be assumed that the MAILGRAM operations undertaken by the Post Office would be subject to Commission jurisdiction if done by some one other than the Federal Government, the fact that these operations were performed by the Federal Government exempts them from the jurisdiction of the Commission to control or regulate.

^{20/} A Communications Study made in 1953 by the Subcommittee on a Communications Study of the Senate Committee on Interstate and Foreign Commerce, 83rd Cong., 1st Sess., Senate Doc. 53 (1953) lists (at p. 6) "Government operated communications services" as Western Union's

"fourth source of competition * * *. The General Services Administration, for example, not only operates an extensive leased wire telegraph network, but actively solicits telegraph business from other Government agencies and departments in competition with Western Union."

^{21/} Executive Order No. 10995 issued February 19, 1962, 27 Fed. Reg. 1519.

^{22/} See, also, Reorganization Plan No. 1 of 1970 dated February 9, 1970, embodying President Nixon's proposal to establish an Office of Telecommunications Policy in the Executive Office of the President.

3. The Commission Properly Limited Its
Consideration to the Western Union
Phase of MAILGRAM

Since, as just shown, the Commission has no jurisdiction with respect to the portion of the proposed MAILGRAM service performed by the Post Office, it follows, we submit, that the Commission properly limited its consideration to the phases of MAILGRAM to be performed by Western Union in determining whether to permit Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period.

This conclusion is in no way affected by the cases cited by UTW (Br., pp. 42-43)^{23/} in support of its claim that the Commission should have passed upon the Post Office's authority to participate with Western Union in MAILGRAM, irrespective of whether it has jurisdiction over the Post Office's activities. The cases relied on by UTW stand for the proposition that an administrative agency should take other laws or statutes into account when they bear upon the matters under consideration by the Commission. As stated by this Court in City of Chicago, supra (p. 113, p. 635):

"A regulatory agency may, should, and in some instances, must give consideration to objectives expressed by Congress in other legislation (fn. omitted) assuming they can be related to the objectives of the statute administered by the agency (fn. omitted)."

In the instant case, UTW's claim that the Post Office has no authority to participate with Western Union in MAILGRAM is wholly

^{23/} The cases cited by UTW are (1) City of Chicago v. F.P.C., 128 U.S. App. D.C. 107, 385 F. 2d 629 (1967), cert. denied 390 U.S. 945 (1968); (2) McLean Trucking Co. v. United States, 321 U.S. 67 (1944); and (3) F.M.C. v. Aktiebolaget Svenska Am. L., 390 U.S. 238 (1968).

unrelated, legally, to the action taken in the Commission's order here under review. All that order does is permit Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period. The Commission's order relates only to Western Union over which it has jurisdiction and it takes only the action necessary to enable Western Union to discharge the MAILGRAM responsibilities which it has undertaken in cooperation with the Post Office. Whether as a legal matter the Post Office has authority to discharge the responsibilities it has undertaken in MAILGRAM is irrelevant to the issues raised by Western Union's tariff offering. The Commission's order clearly does not authorize or sanction Post Office participation in MAILGRAM nor does it provide that the MAILGRAM service is to go forward, irrespective of the Post Office's authority in the matter.^{24/}

In other words, what we have here is a situation in which one of two or more of the parties to a proposed undertaking is subject to Commission regulation and as a result needs Commission sanction before it can go ahead with its share of the undertaking. In these circumstances, the only question before the Commission is whether it should grant the approval needed by the party subject to its jurisdiction, with the Commission's grant of such approval only opening the way for participation by that party. It says nothing about the authority of the other parties. Any questions as to the authority of the others

^{24/} The only relation between Western Union's tariff offering and Petitioner's claim is the practical one that a determination that the Post Office lacks the requisite authority, would frustrate the cooperative undertaking and thereby render moot Western Union's tariff offering.

to the proposed undertaking are for the Court or agency having jurisdiction in the matter.

The recognition of such division of jurisdiction helps explain the bifurcation in the litigation over the experiment undertaken about 15 years ago by the Post Office with respect to the carrying of first-class mail by air on a space-available basis. Compare American Airlines, Inc. v. C.A.B., 97 U.S. App. D.C. 324, 231 F. 2d 483 (1956) with Atchison, Topeka & Santa Fe Ry. Co. v. Summerfield, 128 F. Supp. 266 (D.C. D.C. 1955), reversed on other grounds, 97 U.S. App. D.C. 203, 229 F. 2d 777 (1955), cert. denied, 351 U.S. 926 (1956). The CAB litigation considered only that agency's authority to grant the exemptions needed by certain carriers in order to participate in the experiment. The litigation instituted by the District Court on the other hand, was addressed to the Post Office authority to undertake the experiment.

It is not unusual for jurisdiction with respect to different aspects of, or different parties to, a proposed undertaking to be divided among different agencies on the one hand, or between an agency and the Courts, on the other. In such a situation, the only matters properly before the agency or Court are the questions as to the portion of, or the party to, the proposed undertaking subject to its jurisdiction and the considerations relating to authority of the other parties are irrelevant thereto. For example, where a natural-gas company, which is a subsidiary of a registered holding company, wishes to construct and operate facilities subject to regulation by the Federal Power Commission, it may not undertake such construction until (1) the FPC has issued a certificate authorizing the proposed construction, and (2) the SEC has approved the issuance of the securities by which the parent

would obtain the funds required to construct the project. In passing upon the applications submitted for the requisite authority, each agency's consideration is limited to those aspects within the areas of responsibility delegated to it. See, e.g., Michigan-Wisconsin Pipe Line Co., 6 F.P.C. 1, 23-24 (1947); Michigan-Wisconsin Pipe Line Co., 9 F.P.C. 152, 163 (1950); United Gas Pipe Line Co., 10 F.P.C. 35, 45 (1951).

4. Question of Post Office Authority Is Not Reached in This Proceeding

Since, as just shown, the Commission properly declined to pass upon the validity of the Post Office's participation in MAILGRAM in permitting Western Union's MAILGRAM rates and regulations to become effective, it follows that UTW's claims as to the authority of the Post Office is not properly before the Court in this proceeding. This is particularly so since the statutes vesting jurisdiction in the Courts of Appeals to review agency orders limit such review to a determination of the validity of the agency's order. See, e. g., 28 U.S.C. 2342, 2349. Indeed, in view of the special relationship between the Courts and the administrative agencies (see, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940)), it is well established that judicial review of administrative action is limited to the grounds upon which the agency based its action. S.E.C. v. Chenery Corp., 318 U.S. 80, 88 (1943); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). A fortiori, upon review of an

administrative order, the Court may consider only "the issues as defined by the administrative ruling under attack." Thompson v. Clifford, ___ U.S. App. D.C. ___, 408 F. 2d 154, 159, fn. 24 (1968) and hence may not pass upon UTW's claims regarding Post Office authority which the Commission properly declined to reach because beyond its jurisdiction.

Such a result in this proceeding would not foreclose UTW from obtaining a Court ruling upon its contentions. Indeed, UTW has apparently recognized the possibility that this Court might not reach these contentions in the instant proceeding and has filed a complaint for declaratory order and injunction against the Postmaster General and Western Union in Civil Action No. 148-70 in the District Court for the District of Columbia, in which UTW is asserting, inter alia, the same contentions as to the lack of Post Office authority. These issues will be properly before the Court when and if the District Court has made a decision thereon and an appeal from that decision is taken to this Court.^{25/}

B. The Post Office Has Authority to Perform
the MAILGRAM Functions Undertaken By It

We have just shown (1) that in permitting Western Union's proposed MAILGRAM rates and regulations to become effective for a two-

^{25/} Western Union's suggestion to the District Court that it defer consideration of these contentions of UTW until this Court has acted, was based on the consideration that, since UTW is pressing the same contentions in the instant proceeding, it would be wasteful and unseemly for the District Court to go forward unless and until this Court rules against reaching these claims of UTW in the instant proceeding as urged by Western Union.

year experimental period the Commission properly declined to pass on UTW's claims as to the lack of Post Office authority and (2) that this Court should affirm this aspect of the Commission order without reaching these claims of UTW. In the event, however, that the Court decides, despite the foregoing, to reach and pass upon these contentions of UTW in this proceeding, we show below that UTW's contentions are in error and the Post Office has the requisite authority to do what it has undertaken to do with respect to MAILGRAM.

1. The Postal Laws Provide the Post Office
With The Requisite Authority

In support of its claim that the Post Office lacks authority to perform the MAILGRAM functions undertaken by it, UTW (Br., pp. 30-36) relies, inter alia, on the Postal Laws contained in Title 39 of the United States Code. According to UTW (Br., p. 31) Title 39 is "a most detailed and meticulously drafted statute" with "[t]he grants of authority to the Post Office Department [being] among the most sharply defined and rigidly circumscribed in the law." Therefore, UTW urges, it would be necessary for the Post Office to have express authorization before its participation in MAILGRAM could be valid; and the Postal Laws, still according to UTW, contain no such express authorization.

(a) The Authority Delegated to the Post Office
Permits the MAILGRAM Activities Undertaken
By It

Contrary to UTW (Br., pp. 33-36), the express provisions of Title 39 clearly authorize the Post Office to perform functions such as

administrative order, the Court may consider only "the issues as defined by the administrative ruling under attack." Thompson v. Clifford, ___ U. S. App. D.C. ___, 408 F. 2d 154, 159, fn. 24 (1968) and hence may not pass upon UTW's claims regarding Post Office authority which the Commission properly declined to reach because beyond its jurisdiction.

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We have just shown (1) that in permitting Western Union's proposed MAILGRAM rates and regulations to become effective for a two-

^{25/} Western Union's suggestion to the District Court that it defer consideration of these contentions of UTW until this Court has acted, was based on the consideration that, since UTW is pressing the same contentions in the instant proceeding, it would be wasteful and unseemly for the District Court to go forward unless and until this Court rules against reaching these claims of UTW in the instant proceeding as urged by Western Union.

year experimental period the Commission properly declined to pass on UTW's claims as to the lack of Post Office authority and (2) that this Court should affirm this aspect of the Commission order without reaching these claims of UTW. In the event, however, that the Court decides, despite the foregoing, to reach and pass upon these contentions of UTW in this proceeding, we show below that UTW's contentions are in error and the Post Office has the requisite authority to do what it has undertaken to do with respect to MAILGRAM.

1. The Postal Laws Provide the Post Office
With The Requisite Authority

In support of its claim that the Post Office lacks authority to perform the MAILGRAM functions undertaken by it, UTW (Br., pp. 30-36) relies, inter alia, on the Postal Laws contained in Title 39 of the United States Code. According to UTW (Br., p. 31) Title 39 is "a most detailed and meticulously drafted statute" with "[t]he grants of authority to the Post Office Department [being] among the most sharply defined and rigidly circumscribed in the law." Therefore, UTW urges, it would be necessary for the Post Office to have express authorization before its participation in MAILGRAM could be valid; and the Postal Laws, still according to UTW, contain no such express authorization.

(a) The Authority Delegated to the Post Office
Permits the MAILGRAM Activities Undertaken
By It

Contrary to UTW (Br., pp. 33-36), the express provisions of Title 39 clearly authorize the Post Office to perform functions such as

those undertaken by it in connection with MAILGRAM. Thus, there can be no doubt as to its authority to deliver the MAILGRAM message, once it has been inserted in an envelope and placed in the first-class mail stream at the receiving Post Office.

To be sure, the Post Office has, in addition, agreed for a fee of 15 cents per message, to make available Post Office personnel to perform the few clerical operations between the receipt of a MAILGRAM message at the teleprinter in the receiving Post Office and the placing of the envelope containing the message into the first-class mail stream. But, as pointed out earlier, this is only until the requisite automatic equipment therefor is developed and installed. Moreover, the Post office, in any event, has authority to make such an agreement. The existence of such authority is implicit in Section 2203(c) of Title 39 which provides:

"(c) Collections from the following shall be credited by the Postmaster General to current applicable appropriations of the Department and shall be available for expenditure for the purpose of such applicable appropriations --

* * * *

"(3) Payments made by contractors for services performed for them by postal personnel;"

This provision was enacted in 1962 (76 Stat. 109) at the request of the Post Office, which explained the background of the proposal as follows (See S. Rep. No. 1538, 87th Cong., 2d Sess., p. 4; H. Rep. No. 858, 87th Cong., 2d Sess., p. 3 (1962).

"In cases where postal personnel are used to assist contractors in order to keep the mail moving, the Department is reimbursed by the contractor for such service and such reimbursement is also placed into revenues which is not

available for use by the Department to pay compensation of postal employees * * *."

And in recommending enactment of the proposal, both the House and Senate Committees (S. Rep. No. 1538, 87th Cong., 2d Sess., p. 2 (1962), H. Rep. No. 858, 87th Cong., 2d Sess., p. 2 (1962) stated:

"When postal employees are used to assist railroads in loading and unloading cars, the Department is reimbursed since the railroad rates include all terminal handling charges. Under the measure, such reimbursement would be credited to the appropriation out of which the salaries are paid out and thus available to pay the cost involved." 26/

Since the railroad illustration used is indistinguishable, as a practical matter, from the situation here involved, and since the statute is cast in broad terms applicable to "contractors" generally, Section 2203(c) patently would apply to the use of postal employees, in connection with MAILGRAM, particularly for the limited period there contemplated.

Not only does the Post Office thus already have all the authority it needs with respect to each of the MAILGRAM operations

26/ Neither the House nor Senate Committee suggested that there was a lack of authority in the Post Office to permit its employees to assist railroads or other contractors, because of the lack of an express statutory authorization to that effect.

The use of such "backing-in" technique in evidencing Congressional will is not uncommon in the Postal Laws. For example, Congress made known its intent generally to proscribe the opening of first-class mail in the following way (39 U.S.C. 4057):

"Only an employee opening dead mail by authority of the Postmaster General or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department."

See Santana v. United States, 329 F. 2d 854 (1st Cir. 1964), cert. denied 377 U.S. 990 (1964).

undertaken by it,^{27/} but it also has express authorization to engage in experimental undertakings, such as the MAILGRAM experiment here involved. This authorization is contained in Section 504(a) of Title 39, which was originally enacted in 1949 (63 Stat. 608) and which explicitly directs:

"the Postmaster General [to] maintain in the Department a research and development program, including investigation and studies, for the purpose of introducing or improving equipment, supplies, methods, procedures, means and devices used in the Department in order that its business may be more efficiently and economically operated."

UTW (Br., p. 34) seeks to minimize the significance of this provision by asserting that "[t]here are at least three fully but independently dispositive responses to any contention that the Order below may be sustained by §504(a)." First, UTW contends (Br., pp. 34-35) that since the Commission did not consider any question as to the Post Office's authority, "the Court does not properly have before it any 504(a) issue inasmuch as the Commission perceived none." However, it is UTW -- not the Commission or Western Union -- which is urging the Court to pass upon the Post Office's authority, notwithstanding the Commission's refusal to reach the question.

As pointed out earlier, it is Western Union's position that the Commission's order may properly be sustained without reaching the question of Post Office authority and the argument on that question is

^{27/} UTW implies (Br., p. 34) that Western Union has conceded that the Post Office would require further Congressional authorization before it could participate in MAILGRAM on a permanent basis. This implication is wholly unfounded as is apparent from even a casual reading of the statement cited by UTW. (See App. 59).

included herein solely in the event that the Court reaches the question. In these circumstances, it is wholly inconsistent for UTW to urge, on the one hand, that the Court should pass on its claim that the Post Office lacked the requisite authority despite the Commission's refusal to rule on that question and to contend, on the other hand, that the Court, in resolving that question, is precluded from considering the materials supporting such authority because of the very same Commission refusal.

Further, UTW urges (Br., pp. 35-36) that Post Office participation in MAILGRAM violates an alleged national telecommunications policy. UTW's contention as to existence of such a national telecommunications policy is discussed at length, infra pp. 48-58, where it is shown that there is in fact no such national telecommunications policy, and that in any case, Post Office's participation in MAILGRAM would not violate the policy which UTW claims to exist.

Finally, UTW argues (Br., p. 35) that since MAILGRAM concededly is designed to benefit Western Union, it obviously falls outside of Section 504(a) which authorizes only Post Office experiments designed to benefit or improve the Post Office. But the fact that Western Union expects to benefit from MAILGRAM does not mean that the Post Office could not also benefit. The fact is that the Post Office expects to benefit from MAILGRAM, as is clear from the testimony of the Postmaster General before the House Committee on Post Office and Civil Service on June 4, 1969, when, after explaining the operation of the proposed MAILGRAM service, he stated:

"Now, this is just an example of providing a new service to the people that is not now available, utilizing the best of the systems that are available to us." 28/

Indeed, it is expected that the proposed MAILGRAM service will be a marked improvement over both the first-class and air-mail services now available through the Post Office. It is expected that, in addition to creating a sense of urgency absent from these services, MAILGRAM will provide predictable overnight delivery not now available in either the first-class or air-mail service. Statistics recently released by the Post Office show that only 64% of the first-class mail was delivered the next day after an average carriage of 247 miles, and only 26% of the air-mail received overnight delivery after an average carriage of 1284 miles. See the Quality of the Postal Service (Bureau of Finance and Administration, U S. Post Office Department, July 1969), Postal Quarter III PFY, 1968, p. 1. A survey made in 1967 showed that 7.8% of the first-class mail required three or more days to deliver after cancellation of the stamp in the local receiving Post Office. 29/

(b) The Post Office May Properly Participate
In the MAILGRAM Experiment Even in the
Absence of Express Statutory Authorization

Even if the statutory provisions discussed above were deemed to be insufficient to vest the requisite authority in the Post Office, the authority to participate in the MAILGRAM experiment could properly

28/ See Hearings before House Committee on Post Office and Civil Service on Postal Reorganization, 91st Cong., 1st Sess., Tr. p. 231.

29/ See Study of the Postal Service made by Arthur D. Little, Inc. at request of the President's Commission on Postal Organization, Appendix A, Table 2.3.8 (March 1968).

be implied from these provisions together with other provisions contained in Title 39 discussed below. In this regard, it should be noted that UTW's proposed narrow and restrictive construction of Title 39 (Br , pp. 30-33) has already been implicitly rejected by the Courts at least with respect to the Post Office's authority to engage in experimental activities. See Atchison, Topeka & Santa Fe Ry. Co. v. Summerfield, 128 F. Supp. 266 (D.C. D.C. 1955), reversed on other grounds, 97 U.S. App. D.C. 203, 229 F. 2d 777 (1955), cert. denied 351 U S. 926 (1956).

The Atchison Case

The Atchison case involved an attack upon a Post Office experiment in the transportation of first-class mail by air on a space-available basis. The experiment originally had been confined to New York and Washington, then extended to include New York and Chicago, and afterwards further extended to points in Florida. When the Post Office sought further to extend the experiment, this time between points in the western part of the United States, five western railroads filed suit for declaratory judgment and injunction. On cross motions for summary judgment, the District Court expressly recognized (128 F. Supp. at 269):

"It is true, and the Court finds as a fact, that the Comptroller General in passing upon the status of the grant of moneys under appropriation acts has ruled, and he is quite correct, that the general grant of funds to run, maintain and operate the Post Office Department do not negate against the experimental use of some of those funds in an effort to improve the efficiency and economy of the mail."

Further, the District Court agreed with the railroads that the Post Office's proposal conflicted with a statutory provision which it construed to limit the mail carried by air to only mail bearing air-mail postage (Id. at 272) and ruled "as a matter of law that the Postmaster General is acting beyond those limits of authority delegated to him * * * " (Id. at 273). However, the District Court concluded (Id. at 273-74):

"* * * that as a matter of law, under the grant of moneys to run, maintain and operate the Post Office, the Postmaster General did have the right to experiment, his actions in that sense are not unlawful, but the Court will rule that prolonged experiments which by the running of time demonstrate that the knowledge acquired by the experiment has been received and that it is a promulgation of an executive attempt to usurp the power of the legislative function is unlawful.

* * * * *

"The Court will rule as a matter of law that the Postmaster has a right to make this experiment on the West Coast, limited, as the Court said, in that it shall not be unduly prolonged."

30/

On cross appeals, this Court held that the District Court had erred in failing entirely to sustain the Post Office's motion for summary judgment. 97 U S. App. D.C. 203, 229 F. 2d 777. Rejecting the railroads' contention that by prescribing the postage for air-mail, Congress prohibited the Post Office from transporting first-class mail by air on a space-available basis (pp. 206-8, pp. 780-82), this Court, after reviewing the pertinent statutory materials, ruled that (p. 208, p. 782):

30/ The railroads appealed from the denial of a permanent injunction and the Post Office from the limitation upon the proposed West Coast experiment.

"* * * we are unable to find any prohibition of the present experimental program, while we do find statutory provisions broad enough to encompass it within their terms." 31/

Thus, the Atchison case demonstrates that, contrary to UTW's arguments, the Postal Laws are to be given a liberal -- not a restrictive -- reading at least with reference to experimental operations undertaken by the Post Office; that express statutory authorization is not required before the Post Office is permitted to engage in experimental activities designed to improve the postal service; and that such authority may be found from general statutory provisions.

Atchison Case Applicable Here

There is, we submit, more than ample basis for finding authority in the Post Office to engage in the MAILGRAM experiment under either of the approaches adopted by the Courts in the Atchison case. Thus, with regard to the District Court's approach, it should be noted

31/The Court summarized the statutory provisions from which it found the requisite Post Office authority in Atchison as follows (pp. 205-6, pp. 779-80):

"* * * His general authority to arrange for mail transportation stems from a statute which provides: 'The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.' (fn. omitted). By a later enactment 'air routes' were added to the definition of 'post roads established by law.' (fn. omitted) More specific are the provisions of the Civil Aeronautics Act. (fn. omitted) That Act requires the Postmaster General to tender mail to air carriers holding a certificate authorizing the transportation of mail by aircraft according to the needs of the Postal Service, and requires the carriers to transport such mail. It also provides that rates of compensation to air carriers for carrying the mail be fixed by the Civil Aeronautics Board (fn. omitted)."

that MAILGRAM does not involve the expenditure of any funds by the Post Office and further that the experiment, being still in its initial stages, obviously has not been unduly prolonged. Therefore, under the approach of the District Court (which obviously is far more restrictive than that of this Court), a finding that the Post Office has authority to experiment with MAILGRAM would clearly be in order.

A similar finding likewise is in order under this Court's approach. To begin with, there is no express prohibition against the Post Office either performing the portions of the MAILGRAM service undertaken by it or joining with Western Union to provide the cooperative MAILGRAM service. UTW does not expressly contend otherwise, and to the extent that such an argument may be inferred from UTW's discussion of the statutory provisions delineating the various classes of mail (Br., p. 33) it bears repeating that while the effect of the Post Office's cooperation with Western Union in MAILGRAM is to provide a hybrid service falling between first-class mail and telegram service and containing some of the characteristics of both, the portion furnished by the Post Office is primarily first-class mail service, well within the traditional classification of that service.

Moreover, not only is there no express prohibition against the Post Office's experimenting with potential new services such as MAILGRAM, but there are several provisions in Title 39 which provide more than ample basis for finding the requisite authorization. Thus, in addition to provisions discussed supra, pp. 36-39, Congress, in formulating the Postal Policy of the United States (39 U.S.C. 2301)

made clear its intent that the Post Office should keep up with the times and the developing needs of the public for service and facilities for the communication of intelligence. See, e.g., 39 U.S.C. 2301(2)(3). Likewise, in its Declaration of Policy, contained in 39 U.S.C. 2302, Congress expressly referred, inter alia, to (39 U.S.C. 2302(c)(1):

"(B) the development and maintenance of a postal service adapted to the present needs, and adaptable to the future needs, of the people of the United States;

"(C) the promotion of adequate, economical, and efficient postal service at reasonable and equitable rates and fees."

Obviously, research and experimentation are necessary, particularly for an enterprise as large and complex as the Post Office, in order to ascertain whether new ideas and proposals for improved and better service are in fact practical. Indeed, Congress has recognized the need for experimentation to achieve these declared objectives. In addition to Section 504(a) discussed supra, p. 39, Congress has provided for the creation of a Postal Modernization Fund, 39 U.S.C. 2231, et seq., the monies in which are to

"* * * be available until expended for obligation by the Postmaster General for the purpose of conducting research, either directly or through private or other organizations, and for the purpose of developing, acquiring, and placing into operation improved equipment and facilities for the performance of the postal function." (39 U.S.C. 2233).

This Congressional intent thus to encourage Post Office experimentation to the end of providing better and more efficient postal service, together with the provisions discussed supra, pp. 36-39, plainly

demonstrate that Congress intended to vest authority in the Post Office to engage in experiments such as MAILGRAM.

In this regard, it should also be noted that to the extent this Court's Opinion in Atchison was predicated upon indications of legislative approval (see 97 U.S. App. D.C. at 208, 229 F. 2d at 782), the Postmaster General expressly apprised Congress of the proposed MAILGRAM service in his testimony given on June 4, 1969 before the House Committee on Post Office and Civil Service on Postal Reorganization. Thus, in response to questioning by Committee members, Postmaster General Blount stated as follows:

"MR. BLOUNT: We have recently announced an experiment with the Western Union Corp. which deals with wireless communication. In this experiment we establish in the local post office a machine to receive messages which would be transmitted electronically. We place them in an envelope with a first-class stamp and put them in the delivery system. It's called Mailogram. It is a step in the direction of electronic postal communications and will bear much looking into the future possibilities of this area." (Tr. 208-9).

* * * *

"MR. BLOUNT: Well, Mr. Chairman, we have now a test program going with Western Union, wherein we have installed in a number of offices, or are in the process of installing, machines to receive electronic messages which we will receive and dispatch in the delivery system with a first-class stamp on the envelope.

"This service is called a Mailogram. It's a new service to the American public. It's faster than anything that can be provided through the regular mail services, yet considerably more economical than the cheapest telegram of Western Union message that can be sent.

"This is in a test phase at the present time, and if the tests work out as we believe they will we are going to expand it for a 2-year period to get a full review of the problems that might be involved before this is instituted nationally. Now, this

is just an example of providing a new service to the people that is not now available, utilizing the best of the systems that are available to us." (Tr. 230-31).

Significantly, no Committee member raised any question as to the Post Office's authority to participate in the experiment, thereby further buttressing the existence of the requisite authority in the Post Office.

2. There Is No National Telecommunications Policy Prohibiting the Post Office From Providing Service in Cooperation With Western Union

UTW argues (Br., p. 8, et seq.) that, apart from any question as to the authority of the Post Office to engage in experiments, there is an overriding national telecommunications policy which prohibits the Post Office from providing any service in cooperation with a telegraph company such as Western Union. In support of this contention, UTW purports to trace what it calls "the history of telecommunications," beginning with the construction of the first telegraph line in 1844 (Br., p. 8) and coming down to date (Br., p. 21), on the basis of which it urges (Br., p. 22):

"The mandate of this history is eloquent and unmistakable to any who will deign to hear of it. It dictates purely private operation of the telegraph industry. It proscribes Post Office participation in the operations of the telegraph industry."

We show below that the alleged history relied on by UTW falls far short of supporting UTW's extravagant assertions. Not only does the history fail to show the existence of the national telecommunications policy asserted by UTW, but even if there were such a policy, it would

not constitute a bar to the Post Office's undertaking responsibilities in a cooperative venture with Western Union in an effort to provide a new and needed means of record communications.

(a) The Agitation for Public Ownership of the Telegraph System Prior to World War I Does Not Support UTW's Position

i. Congress Has Not Established the National Telecommunications Policy Claimed by UTW

The bulk of the history relied on by UTW (Br., pp. 8-15) covers the period between the Civil War and World War I, and shows that several times until 1890 and less frequently thereafter until World War I, the then Postmaster General recommended to Congress, without success, that the Government take over the ownership and operation of the telegraph systems.^{32/}

But apart from the vintage of the material thus relied upon by UTW, which gives rise to a serious question as to their significance today,^{33/} there is no merit to UTW's attempt to infer an affirmative national telecommunications policy, persisting down to today, from the fact that none of these Post Office recommendations succeeded in

^{32/} See, also, Government Ownership of the Electric Means of Communication, S. Doc. 399, 63rd Cong., 2d Sess. (1914), App. A, p. 18, et seq. (Historical Resume of the Agitation for Government Ownership of the Telegraph and Telephone in the United States). (1914 Sen. Doc.).

^{33/} An interesting commentary on the changes which take place with the passage of time is the Post Office's present complete lack of interest in taking over the telegraph system. See Report of Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation (Docket No. 14650), dated April 29, 1966, p. 297 and fn. 56.

obtaining Congressional approval. Since Congress may decline to enact certain legislation for any of a variety of reasons, a Congressional failure to enact the legislation obviously does not serve to establish a general policy against the proposal contained in the unsuccessful legislation from that time forward. UTW significantly fails to cite any statutory provision affirmatively establishing the national telecommunications policy asserted by it.

ii. The Policy Claimed by UTW Would Not Embrace Cooperative Activities Such As MAILGRAM

Moreover, even if the policy asserted by UTW had in fact been established, it would not extend to a joint cooperative undertaking, such as MAILGRAM. This is so because the Government ownership and operation of the telegraph system which the Post Office unsuccessfully urged the Congress to authorize is dramatically different both in concept and result from the functions undertaken by the Post Office in order to provide MAILGRAM service in cooperation with Western Union.

Thus, under the proposals relied on by UTW, the Post Office would get into the telegraph business with both feet over the objection, and to the exclusion of, private enterprise. In contrast, since MAILGRAM is a cooperative undertaking involving both the Post Office and Western Union, the effect of Post Office participation is not to exclude Western Union from the telegraph business. Moreover, the portion of the service undertaken by the Post Office falls well within its established area of operations. As shown earlier herein, the

receipt and electronic transmission of the MAILGRAM message remain the responsibility of Western Union and the Post Office plays no role until the MAILGRAM message is received at the teleprinter in the receiving Post Office. And, once the envelope containing the message is placed in the first-class mail stream, its delivery to the addressee by the Post Office is well within the Post Office's traditional responsibilities. In these circumstances, even assuming that the telecommunications policy allegedly reflected in the history recounted by UTW existed prior to World War I and survived to today, it obviously would not operate to forbid the cooperative undertaking involved in the Post Office's joining forces with Western Union in providing MAILGRAM service.

iii. The 1870 Hubbard Proposal Does
Not Help UTW

The so-called "Hubbard Proposal," made about a century ago, which UTW (Br., pp. 11-12) seeks to highlight, does not advance UTW's position. The basic difference between that proposal and the other Post Office recommendations relied on by UTW is one of form. Thus, whereas under other Post Office recommendations, the Post Office would have gotten into the telegraph business by direct acquisition of the telegraph system, the Hubbard proposal would have injected the Post Office into the telegraph business through the technique of a contract with a private corporation specially incorporated to own the telegraph systems. See Wells, The Relation of the Government to the Telegraph (1873), pp. 8-10.

Consequently, although, as UTW (Br., p. 11) urges, the Hubbard proposal included the possibility that telegrams be delivered by mail (Wells, supra at p. 9), this was merely one very limited aspect of the total overall responsibility intended for the Post Office under the proposal. Since, in contrast, the Post Office's responsibility under MAILGRAM is intended ultimately to be limited to the delivery of the message by mail once the message is received in the receiving Post Office, the failure of the Hubbard proposal about a century ago patently has no bearing upon the propriety of the Post Office's participation in MAILGRAM today.

iv. UTW's Reliance on the 1890 Attorney General Opinion Is Misplaced

UTW stresses as reinforcing its position the activities of Postmaster General Wanamaker in the 1890's and the Opinion of the Attorney General, issued at that time in response to an inquiry by Mr. Wanamaker (Br., pp. 12-15). However, this reliance is misplaced, as is apparent from the materials cited by UTW. Mr. Wanamaker was interested in the Post Office's obtaining control of the telegraph system, either through contract with the owners or through Post Office ownership. Thus, in 1890, he requested Congress to enact legislation which would establish:

"* * * limited post and telegraph service * * * as a bureau or part of the Post Office Department of the United States [with] postal telegrams * * * [being] received at post-offices, transmitted by telegraph and delivered through the medium of the post-office service. * * *" (See Hearings before the House Committee on the Post Office and Post Roads, on H.R. 3319, 51st Cong., 1st Sess. (1890) p. 5; see also, 1914 Sen. Doc., supra, at pp. 25-28).

In accordance with these objectives, Mr. Wanamaker's inquiry and the Opinion of the Attorney General issued in response thereto (19 Op. A.G. 650 (1890)) were concerned with whether the Post Office had authority to contract with telegraph companies for the transmission of messages as a step to the Post Office's getting into the business of accepting, transmitting and delivering telegrams. In addition to the fact that Mr. Wanamaker apparently assumed that the Post Office already had authority to accept and deliver telegraph messages, his inquiry was directed to, and the Attorney General's Opinion assumes, a participation of the Post Office in the telegraph business far beyond anything involved in MAILGRAM.

Moreover, the Attorney General's conclusion was not based upon any prohibition stemming from a "national telecommunications policy" such as urged by UTW. Rather, the rationale of the Attorney General that there was "no law that specifically or by natural inference authorizes the making of the contract" (19 Op. A.G. at 654) and hence that a contract of the type contemplated by Mr. Wanamaker would violate the prohibitions contained in Rev. Stat. 3732 (Id. at 653-55).^{34/}

^{34/} Rev. Stat. 3732 (now 41 U.S.C. 11) has not been changed and continues to provide in pertinent part:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *."

Not only is the Attorney General's rationale unduly restrictive and of doubtful validity,^{35/} particularly in view of this Court's approach in the Atchison case (discussed at length supra, pp. 42-44), but as is shown supra, pp. 36, et seq., the authority vested in the Post Office today clearly extends to its performance of the portions of MAILGRAM undertaken by it, particularly for the experimental period covered by the Commission's order.

(b) The Post-World War I Materials Fail to Establish the Existence of the Claimed National Telecommunications Policy

Implicitly recognizing that the Post Office discontinued recommending Government take over and operation of the telegraph systems

35/A conclusion that the Post Office had the requisite authority would be justified under this Court's approach in Atchison in light of the Attorney General's recognition (19 Op. A.G. at 652-53) that:

"It is manifest that the object of the establishment of postal facilities was the transmission of intelligence for the uses and benefit of the people at large. This purpose was primary and creative, and the methods of communication were subordinate and subject to opportunity and convenience.

"When Congress was authorized to establish post-offices and post-roads it was authorized to establish and control such facilities as should be found valuable to the public for the general transmission of intelligence. The purpose of the grant, by implication, extends the authority granted so as to include all facilities of value in accomplishing such purpose.

"Provision for transmitting telegrams, placing them in postal custody and conveying and delivering them according to the address, may be held to constitute the communication transmitted by wire correspondence, and the message, mail matter."

well before World War I, UTW turns to other materials in an attempt to demonstrate the continued existence of the alleged "national telecommunications policy" since that time. However, none of these materials provide the support envisioned by UTW.

i. Postmaster General's 1919 Report

To begin with, contrary to UTW's statement (Br., p. 16) the Postmaster General did not place before Congress "a proposal for some union between the Post Office and the telegraph" in his report submitted to Congress in 1919 with regard to his control of the telephone and telegraph system for a year during World War I.^{36/} The Postmaster General neither recommended nor proposed the enactment of legislation which would achieve such a result. To be sure, the Postmaster General's report (at pp. 5, 7, 8) contains the comments quoted by UTW, but a reading of these comments in context leaves no doubt that they were made only in passing and were not intended as a recommendation for action by anybody. With there thus being no recommendation of Congressional action, UTW's assertion that the failure of Congress to act was "in keeping with the legislative policy" (Br., p. 16) falls of its own weight.

ii. Enactment of Federal Communications Act

Similarly unfounded is UTW's assertion (Br., p. 17) that the Communications Act was drafted and passed "with the frame of

^{36/} Report of the Postmaster General on Supervision and Operation of Telegraph, Telephone and Cable Properties, S. Doc. 152, 66th Cong., 1st Sess. (1919).

reference of fixed opposition to any Government participation as bearing impairment of and threat to private enterprise [sic]."

There is nothing either in the Communications Act itself or in the ^{37/} Interdepartmental Committee report cited by UTW (Br., p. 17) prohibiting Government operation of telecommunications systems.

Moreover, the Interdepartmental Committee report (at pp. 3-4) expressly refers to the Government telecommunications systems and the Act neither subjects these systems to Commission regulation nor prohibits them from operating independently of such regulation. See supra, pp. 28-30. Indeed, in addition to specifically listing the pros and cons of Government ownership (at pp. 5-6) the Interdepartmental Committee adopted the conclusion (p. 5) that:

"* * * communications companies and their holding companies, at least for the present, should be privately owned and operated. In this connection one member of the Committee emphasized that the law should be clarified to prevent control by foreigners of holding companies investing in American communications companies."

Such a conclusion patently does not embody any recognition of a "national telecommunications policy" such as that asserted by UTW nor does it manifest any "fixed opposition to any Government participation" in the telegraph business, as urged by UTW.

iii. The 1943 Merger Legislation

Likewise misplaced is UTW's reliance upon the history of legislation enacted in 1943 opening the way for the merger of the

^{37/} Study of Communications by an Interdepartmental Committee, Senate Committee Print, S. Committee on Interstate Commerce, 73rd Cong., 2d Sess. (1934).

financially shaky Postal Telegraph Company into Western Union. 57 Stat. 5 (1943), 47 U.S.C. 222. Although, as urged by UTW (Br., p. 19), Government ownership of Postal Telegraph was mentioned as an alternative to merger with Western Union, that alternative was given short shrift, as is clearly indicated by the limited discussion referred to by UTW. Moreover, the fact that Government ownership of Postal Telegraph was mentioned as a possible alternative neither establishes a national telecommunications policy such as urged by UTW nor bears upon the limited MAILGRAM responsibilities undertaken by the Post Office (all as pointed out in greater detail, supra pp. 49-52).

The suggestion of a Secretary of Commerce on which UTW also relies (Br., pp. 20-21) similarly is beside the point, since, as UTW recognizes, the Senate Committee deferred to the Post Office's preference that the suggestion be left in abeyance (S. Rep. No. 13, 78th Cong., 1st Sess., p. 6 (1943)). The suggestion thus never reached the stage of serious consideration by Congress and hence, the absence of Congressional action thereon indicates nothing either way.

iv. The 1966 Report of the FCC
Telephone and Telegraph Committee

In this connection, UTW attempts (Br., p. 21) to disparage the Report of the FCC Telephone and Telegraph Committees in the Domestic Telegraph Investigation (FCC Docket No. 14650) dated April 29, 1966. The Committees' outright rejection of "transferring [the telegraph service] to the public sector", on the one hand, and its suggestion that "much further study" should be given to "the feasibility of utilizing rapid mail service for the final delivery of telegrams" (pp. 299, 300),

on the other, emphasize the irrelevance of the elaborate history recounted by UTW vis-a-vis the limited MAILGRAM responsibilities undertaken by the Post Office. Finally, as to the alleged absence of the "study as the Report suggested" claimed by UTW (Br., p. 21), the fact is that the two-year experimental MAILGRAM service covered by the Commission's order here involved is designed to constitute as just such a study.^{38/} See supra pp. 14-17.

III.

UTW IS NOT AGGRIEVED BY THE COMMISSION'S ORDER

Until this point, we have assumed that UTW is aggrieved by the Commission's order and so has standing to seek judicial review of that order. On this assumption, we have demonstrated that the Commission's order is free of error and hence should be affirmed. The fact is, we submit, that UTW is not in actuality "aggrieved" by the Commission's order and, hence, does not have the requisite standing to seek judicial review.

We base this contention upon our showing set out in Point I(D) supra, pp. 21-25, that the Commission's action in permitting Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period will not impair the job security of UTW's

^{38/} The Committees' reference (p. 298) to Special Delivery and ABCD mail as "rapid" mail obviously was not intended to exclude, as UTW implies (Br., p. 21), the use of first-class mail for the delivery of messages as contemplated in MAILGRAM if that proves feasible.

members. As is there shown, UTW and its members will not be adversely affected by Western Union's participation in MAILGRAM particularly during the experimental period covered by the Commission's order here under review, when MAILGRAM is being offered only to a comparatively small group of potential users for a limited period of time.

In this connection, it is recognized that the trend currently in favor of permitting judicial review, exemplified by decisions such as Association of Data Processing Service Organizations v. Camp, Sup. Ct. No. 85, 38 L.W. 4193 (decided March 3, 1970); Barlow v. Collins, Sup. Ct. No. 249, 38 L.W. 4195 (decided March 3, 1970); Scanwell Laboratories, Inc. v. Thomas, D.C. Cir. No. 23863 (decided February 13, 1970). Also it is recognized that standing to obtain review of agency action may be based on interests other than economic injury. See, e.g., Office of Communication of United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966); National Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 116, 124, 362 F. 2d 946, 954 (1966); National Broadcasting Co. v. F.C.C., 76 U.S. App. D.C. 238, 132 F. 2d 545 (1942), aff'd 319 U.S. 239 (1943).

Despite the broadened receptive attitude reflected in the recent cases, however, where the aggrievement is predicated upon alleged economic injury, a showing of a strong probability of such injury flowing directly from the order being brought to the Court is still required. See, e.g., National Coal Association v. F.P.C., 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951); Bebchick v. Public Utilities Commission, 109 U.S. App. D.C. 298, 287 F. 2d 337 (1961); Citizens Association of Georgetown

v. Simonson, ___ U.S. App. D.C. ___, 403 F. 2d 175, 176 (1968); cf. Office of Communication of United Church of Christ v. F.C.C., supra at p. 336, p. 1002. Indeed, in Data Processing, supra, the Supreme Court made it clear that "injury in fact, economic or otherwise" still remains a prerequisite to standing. See 38 L.W. 4193; see, also National Association of Securities Dealers, Inc. v. S.E.C., D.C. Cir. No. 20164 (decided July 1, 1969), slip op. pp. 34-35 (concurring opinion of Chief Judge Bazelon).

In these circumstances, since, as shown supra pp. 21-25, it is improbable that UTW and its members will suffer economic injury from the Commission's order permitting Western Union's proposed MAILGRAM rates and regulations to become effective for a two-year experimental period, it follows that UTW lacks the requisite "aggrievement" necessary to obtain review of the Commission's order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for review should be dismissed. Alternatively, the Commission's order should be affirmed.

Respectfully submitted,

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Dated April 17, 1970

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I, Melvin Richter, hereby certify that the foregoing document was served this 17th day of April, 1970, by mailing true copies thereof, postage prepaid, to the following persons at the addresses shown below:

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For Immediate Release

WU AND POST OFFICE TO TEST
NEW TELEGRAM-LETTER SERVICE

Western Union will join with the U.S. Post Office in testing a new telegram-letter service, it was announced today (April 2) by Russell W. McFall, president of Western Union.

Plans are now being developed with Post Office officials for a test of telegram-letter service in approximately twelve cities this year.

It is planned that telegram-letters, in the initial test stage, will be transmitted electronically by Western Union to a receiving teleprinter in the appropriate distant Post Office. The telegram-letter would then be inserted into a pre-stamped window envelope, treated as first-class mail, and delivered with other mail by a regular letter carrier.

The study-test phase, extending over nine months, would use dummy messages to measure speed, costs, and overall performance of the proposed service. A trial service, with established rates, would then begin early next year, following the test period, to determine customer acceptance.

One of the objectives of the trial service period will be the evaluation of customer application of the telegram-letter in the conduct of their business.

Earl D. Hilburn, executive vice-president of Western Union, said telegram-letter service would necessarily undergo a number of evolutionary phases as the nature of public demand was determined.

"Teleprinter exchange customers would have ready access to telegram-letter service," said Mr. Hilburn. "We also foresee a second method of originating telegram-letters at high speed by large business firms where messages, such as bank statements, are already stored in electrical form in the customer's computer.

"We foresee a substantial demand for a new service of this kind, and if studies show it to be profitable, larger Post Offices would be equipped with higher speed receiving machines, including automatic bursting, folding and stuffing machinery.

"We expect that telegram-letters will meet a public need for rapid delivery of urgent, lengthy correspondence at an attractive rate."

XXX

WALL STREET JOURNAL

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MONDAY, JUNE 30, 1969

Corporate Juggling Act

Western Union Chief Strives to Maintain Wire Service While Building New Systems

By ROGER W. BENEDICT

Staff Reporter of THE WALL STREET JOURNAL

NEW YORK—"If two outfits ever deserved each other, it's these two."

This was the somewhat cynical reaction in some quarters earlier this year when Western Union Telegraph Co. and the U.S. Post Office Department announced they were joining in an experimental venture for handling messages.

Everybody knows the problems of the Post Office. And Western Union hardly can boast of a public reputation for service either. Remember the flap a few years ago when President Johnson sent wires to the nation's governors calling them to a White House conference, and Texas Gov. John Connally, LBJ's longtime friend, didn't show up because the telegram wasn't delivered. And again the following year with Dallas Mayor Erik Jonsson as the unwitting victim when a Western Union messenger slipped an LBJ telegram under the wrong door.

The files of the Federal Communications Commission are thick with complaints about the company's numerous failures to meet its self-set 75-minute delivery goal for their so-called "fast" or daytime telegrams. The FCC itself has issued several warnings to the company, telling it, in effect, to "shape up."

At times it seemed that Western Union didn't really care. It has pushed through rate increase after rate increase while long-distance telephone rates were steadily coming down, so that its onetime price advantage is long gone. It costs \$2.25 to send a 15-word day telegram from New York to San Francisco, compared with station-to-station telephone rates of 75 cents to \$1.75 for three minutes, depending on the time of day the call is made. In 1946, a Western Union telegram cost \$1.63 and telephone service cost \$2.50 between these two cities.

As a consequence, Western Union's volume of conventional telegrams last year sagged to less than a third of the 262 million messages sent annually 10 years ago. More than 4,000 offices have been closed, and the work force has shrunk by more than 18,000 employees in the past two decades. If anything, the uniforms seem shabbier, the elderly messengers older and the dingy offices, often in decaying railroad stations, dingier. Hardly a picture of a thriving enterprise.

But appearances can be deceiving. Dramatic changes are taking place within Western Union that are obscured by the drab face it presents to the world. Some analysts, in fact, are singling out the company as one of the potential leaders in the quickly coming era that will be characterized by the marriage of computers and electronic communications.

One of the key changes was the selection four years ago of a president with a background completely unlike any of his predecessors in the 118-year history of the company. Russell W. McFall, now also chairman, earlier had helped develop the first nose cones to survive re-entry into the earth's atmosphere as head of General Electric Co.'s ballistic missile program. He came to Western Union from Litton Industries Inc., where he headed the radiation and communication equipment division.



Mr. McFall, ruddy-faced and exuberant, 47-year-old Mr. McFall maintains his permanent residence on a golf course at Ormond Beach, Fla., and has another residence next to Washington's Congressional Country Club. But he hasn't had much time for golf lately.

Running a company such as Western Union is partly a juggling act—planning the expenditure of hundreds of millions of dollars to build a sophisticated new computer-communications system for a whole series of markets yet to come, while at the same time operating a partly antiquated message system at the lowest possible cost.

"Our first task quite simply has been to manage a declining business as efficiently as hell while it is still declining," Mr. McFall says. "And I believe our improved earnings show we are managing better."

Last year Western Union's net income from operations climbed 23% to \$21.6 million, or \$2.04 a share. And in the first quarter of this year, it soared 53% to \$6.9 million, or 74 cents a

share. Mr. McFall cautions that the company had a sharp increase in wage and pension costs on June 1. But he predicts full-year earnings will top last year's \$2.04 a share, despite the sale on April 1 of 1.3 million additional common shares. That would indicate a record net income, up at least 13% from last year.

Even the steady decline in the telegram business has slowed this year, rather than accelerating as many had predicted after a big rate increase last November. The company has reversed a 10-year decline in revenue from this source. Mr. McFall predicts the company's overall revenue this year will rise to a record \$380 million, up about 3% from last year. The chief gains, he notes, will continue to come from nontelegram operations, which last year accounted for about 63% of Western Union's total, up from only 30% ten years ago.

Major Steps Taken

What's more, this turnaround has been achieved without the earning and revenue benefits. Mr. McFall expects the company will generate in the future from a number of recent major moves:

—Western Union expects to complete by late next year the complex purchase of TWX American Telephone & Telegraph Co.'s public teleprinter network, making Western Union the sole provider of direct-dial customer-to-customer service in the U.S., sharply boosting revenue and opening major markets for computer-communications services.

—Western Union is completing this year the computerizing of its own Telex public teleprinter network, and is just beginning to offer shared-use computer-controlled communications services both through this public network and through special private networks.

—Western Union has moved into a joint venture, Western Union Computer Utilities, which is franchising local data processing centers around the country. For the longer term, the company expects to offer through its communications networks, first to business firms and eventually to home consumers, "data power" services much the way a local utility delivers electric power.

The joint venture with the Post Office is equally intriguing. Western Union will announce today that within a week it will begin sending test messages from its Mahwah, N.J., computer center to 15 large city post offices across the country in a six-month tryout of its

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"mailgram" program. This is expected to result in Western Union offering next January the new service nationwide through 90 or more post offices to its public teleprinter customers. They will be able to send teleprinter messages direct to post offices for first class mail delivery, at a cost somewhat less than a telegram but more than first class mail charges.

For Western Union, success of this program would mean overcoming the sticky problem of getting a message, delivered by hand to the home or the office, where it runs into most of its woes. For the Post Office, it would mean faster movement of messages over long distances from city to city, where it encounters its major headaches.

Off in the future is a Western Union plan to computerize TWX and the public message network to form a united "recorded message" communications system for the first time. The nation basically has two forms of communication, voice (telephone) and recorded message (telegram), although with modern technology both systems handle communications as diverse as computer data and facsimile pictures. Most of the circuitry for both systems will continue to be supplied by AT&T. The major difference between the two has been that for a long time, the telephone system has been a single integrated system, while recorded message systems have been fragmented.

All of this may seem a bit pretentious for a company whose \$775 million of assets are dwarfed by its chief competitor—\$40 billion AT&T—and whose new ventures face stiff competition from such giants as International Business Machines Corp. and GE.

"Substantial Progress" Seen

Russ McFall is the first to concede Western Union's plans are ambitious and could go sour. But he also believes the company is making "substantial progress" toward its goals. By the end of next year, he says, Western Union will have more computer capacity connected to communications lines and collecting and processing data simultaneously than any other company in either the communications or computer industries.

The immediate improvement in Western Union's fortunes, however, reflects far more private changes Mr. McFall has brought about in the last few years.

Western Union grew up with the nation's railroads, with its wires strung along railroad tracks and its offices usually in local depots. It adopted the same highly centralized, rigidly departmentalized management structure used by the railroads, and was frequently headed by railroad men. Emphasis was on operations, and when Mr. McFall moved into the president's chair, the company had never had a vice president of marketing, a long-range planning department or a research and development organization.

Mr. McFall scrapped the old system, and by the end of this year he will have replaced a jodgepodge of 135 field, district and divisional jobs holding fractionated authority with just 18 regional managers given full responsibility for everything that happens in their area. He's set up a "carrot and stick" system for these man-

agers aimed at rewarding those who produce and easing out those who don't.

He's built marketing planning and research and development departments and assembled a corps of hundreds of computer technicians. New management talent has been recruited from the National Aeronautics and Space Administration, GE, Radio Corp. of America, Litton, Sperry Rand Corp. and IBM. For the first time a strong middle management level exists, with 41 assistant vice presidents—a title that didn't exist when he became president—and 10 other executives with similar responsibilities. With scheduled retirements, by next year nearly every top job will be held by an executive who has joined Western Union since he arrived.

The average age of Western Union executives is five years younger than the average five years ago. Mr. McFall is practicing what he preaches by increasingly using computers in internal management operations.

Western Union, however, had embarked on some important moves before Mr. McFall arrived on the scene: Building and leasing private communications systems, a business that more than doubled in the past decade to \$118 million in revenue last year; starting Telex in competition with AT&T's TWX and, through faster growth than its rival, creating a business that produces over \$40 million annually; and constructing the company's own private coast-to-coast microwave system, lessening its dependence on leasing circuits from AT&T and opening up new services.

Becoming Ubiquitous

Also, it was broadening its services. Few realize how ubiquitous Western Union has become. Last year it sold 10 million money orders worth \$900 million, delivered 1.5 million pounds of candy as Candygrams, performed 600,000 errands, provided wake-up service for 250,000 people and transmitted 140,000 orders for flowers to florists. What's more, it interviews up to 6,000 people a week for political and consumer research polls, reports on ship movements, operates a telephone answering service, leases radio-controlled clocks, provides news media with sports scores and stock quotations, changes window displays, makes quality-control purchases of bread, soft drinks and gasoline, and runs a nuclear bomb alarm system for the Defense Department.

But there have been growing problems, too. Both its public teleprinter and leased communications systems have been running into increasing competition from computer makers and the low cost of leasing of packages of circuits by AT&T. Meanwhile, the company's wage costs have been rising about a third faster than the national average of union settlements, pushing up the cost of telegrams. Urban sprawl has been creating new difficulties in delivering telegrams.

Pensions are a major problem for Western Union. With more than 11,000 retired employees, nearly double the number 10 years ago, the company has one of the biggest pension loads of any comparably sized corporation in the U.S. Pension costs will rise to about \$21.2 million this year from \$17.9 million last year and are scheduled to climb to \$23.4 million in 1970.

Mr. McFall believes each of these problems will be solved as Western Union develops its integrated computer-controlled communication system.

Telex customers already are being offered five computer-controlled communications services, a factor helping attract 3,000 new customers so far this year. Addition of the 42,200-customer TWX to the 28,900-customer Telex will sharply expand not only immediate revenue (about \$72 million for TWX last year) but markets for computer-related services as well, Mr. McFall believes. He foresees public teleprinter service eventually expanding to about 200,000 customers, aided by the lure of computer services.

Private Systems Offered

To augment private leased systems business, Western Union already has attracted eight major customers, including Montgomery Ward & Co., a unit of Marcor Inc., Kaiser Aluminum & Chemical Corp. and National Biscuit Co. for its INFO-COM, a shared-use computer-controlled communications system that offers the advantage of a private system without the need by the customer to invest in computers and the personnel to run and maintain them. It's adding about one securities firm a month to its Sloom, a similar shared-use system for the brokerage industry, with 15 concerns already signed up.

Because about 85% of Western Union's public message telegram revenue comes from business use, the planned computerization of this system is expected to solve much of the speed-of-service problem, Mr. McFall says.

As for the general public, as about 90% of their orders come in by phone, the company is setting up telephone message centers—such as a 50-operator facility opened this month in New York City—to ease the problems of the usual harried two-operator local offices. And the Post Office experiment could lead to the handling and delivery of many telegrams by mail carriers.

Western Union currently operates only 1,200 company-owned offices and franchises more than 8,000 agency offices. Mr. McFall says there may come a time when the company will have no public offices. Only a tiny part of its business is transacted over the counter any more. Business concerns mainly use tie-line machines, and the public uses the telephone.

To build its new system, Western Union will continue making outlays of "well over" \$100 million annually for the "foreseeable future," Mr. McFall says. About half of this will have to be raised in the money markets. Money needs are set for this year's planned \$130 million outlays, but will rise sharply next year with the expected purchase of TWX, he says. Western Union will spend about \$110 million to buy and start up TWX, of which about \$80 million will go to AT&T.

This heavy capital spending, however, along with the use of accelerated depreciation, is expected to result in the continuation this year of no liability for Federal income taxes, the company reports. It last paid Federal income taxes in 1963. And its dividend distributions are again expected to be ruled tax-free to stockholders this year as a return of capital.


western union

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FOR RELEASE: MONDAY A.M. JUNE 30

WESTERN UNION AND U.S. POST OFFICE BEGIN TEST
OF JOINT TELEGRAM-LETTER SERVICE IN 15 CITIES

NEW YORK, June 30 -- A six-month test of "MAILGRAM," a combined telegram/letter service developed jointly by the U.S. Post Office Department and Western Union, began today at Post Offices in 15 cities across the country.

Western Union President Russell W. McFall launched the delivery test program this morning at Western Union headquarters in New York City with a MAILGRAM to Postmaster General Winton M. Blount.

The new MAILGRAM service is designed for fast, economical overnight delivery of written messages. MAILGRAMS move between cities over Western Union facilities, are printed out at Post Offices, and delivered by regular mail carriers.

During the initial test, special-text MAILGRAMS will originate at the company's Technology Center at Mahwah, N.J. Thousands of test messages will be transmitted over a teleprinter network to participating Post Offices for regular first-class mail delivery within the area served by the test Post Offices.

McFall described MAILGRAM as the first co-operative effort by the Post Office Department and a business firm to help improve the nation's public message communications services. "This is a natural

natural association, and in the public interest, as both the U.S. Post Office Department and Western Union are dedicated to providing the nation with the most modern, efficient and economical communications services possible", McFall said.

Preliminary plans call for the first public use of MAILGRAM to start early next year when it will be made available on an experimental basis to users of Western Union's teleprinter exchange (Telex) service, with next day delivery anywhere in the contiguous 48 states.

Commenting on the new service, McFall said, "If MAILGRAM develops as anticipated, it should be a valuable new public service, and cut Post Office costs. At the same time, it should substantially increase Western Union's public message business."

MAILGRAM delivery points in the present tests are Falls Church, Va.; Chicago; Houston; Huntsville, Ala.; Jacksonville, Fla.; Denver; Tacoma; Oakland; Los Angeles; Boston; Minneapolis; Binghamton and Albany, N.Y.; Wayne, Mich.; and Wilmington, Del.

Western Union currently provides business and industry, government and the general public with a broad range of record communications services, including leased private services, shared-used computer systems and teleprinter exchange (Telex) services. The company's total revenues in 1968 were \$368 million. Net income was \$22 million.

##

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH CO.,
Intervenor.

United States Court of Appeals
for the District of Columbia Circuit

APR 30 1970 ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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1962 U.S. Code Cong. & Adm. News.

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* Report of the Telephone and Telegraph Committees
of the Federal Communications Commission in the
Domestic Telegraph Investigation (Docket No.
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Other Authorities (cont.)

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19 Op. Atty. Gen. 650 (1890).	41, 42
21 Op. Atty. Gen. 473 (1897).	37
34 Op. Atty. Gen. 302 (1924).	37
35 Op. Atty. Gen. 485 (1928).	37
22 Comp. Gen. 563 (1942).	37

*Cases and other authorities chiefly relied upon are marked by an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH CO.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF ISSUES PRESENTED*

1. Whether the MAILGRAM service is legally permissible under the Communications Act.
2. Whether the Commission could reasonably find that the objections raised by the petitioner to this temporary experimental service did not warrant suspension of the tariff.
3. Whether the Post Office Department has authority to participate in the MAILGRAM service.**

* This case has not previously been before this Court.

** The Commission did not decide this issue in the order under review. The petitioner has briefed the question, however, and the United States has responded on behalf of the Postmaster General (See Argument, Point III), so that should the Court decide the matter is properly at issue, the positions of the parties are before it.

COUNTERSTATEMENT OF THE CASE

The petition for review in this case was filed under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), from a Memorandum Opinion and Order of the Federal Communications Commission released January 2, 1970 (A. 72-75). The Commission's order denied a petition by the United Telegraph Workers Union (petitioner herein) requesting suspension and investigation of a tariff filed by the Western Union Telegraph Company (intervenor herein). Allowing the tariff to become effective, as the Commission's order provides, permits Western Union in conjunction with the United States Post Office Department to conduct a two year test of a new message transmittal service known as MAILGRAM.

A. Background.

Most of the nation's record communications are handled by the U. S. Post Office Department, the various telephone companies, and Western Union. Western Union offers a variety of record communications services falling generally into two classes. Some are so-called "do-it-yourself" services such as Telex,^{1/}

^{1/} Telex is an automatic teleprinter exchange service provided by Western Union with which each subscriber is able to send and receive record messages through teleprinters on his premises.

INFO-COM,^{2/} and Private Line^{3/} where the communications are transmitted by the customer-originator through facilities provided by the carrier and are automatically received at terminals located on customer premises at the point of destination. Delivery time is usually just the elapsed time of transmission. Additionally, there are deferred delivery services, that is, Telegrams and Overnight Telegrams. These messages may be delivered by telephone, tie line, or messenger, on the same day in the case of telegrams and on the next day in the case of Overnight Telegrams (Supp. A. Tab B, 1-2).

In the past decade the volume of public message telegraph service has declined. Even though new services such as Telex and INFO-COM (See notes 1 and 2, supra) have been initiated, there has been a growing recognition that "Western Union faces serious problems which could . . . affect its ability to provide the requisite standard of service" to the public (Domestic Telegraph Inquiry, 27 F.R. 5353, 5354 (1962). Thus in 1962 the Commission began a sweeping

^{2/} INFO-COM is a relatively new share-system network of limited availability designed to provide private record communications for general business operations through computer-controlled message switching and message-storage and retrieval. INFO-COM is integrated with other Western Union services so that an INFO-COM subscriber can, by means of a teleprinter on his premises, send messages automatically through the Telex public message and the Bell System TWX networks.

^{3/} Private line service consists of furnishing communication facilities between locations specified by the customer without the need for the carrier to establish a connection for each call or message.

inquiry into domestic telegraph service, id., in which it took evidence from a wide assortment of interested parties, including among others Western Union, American Telephone and Telegraph Co., various affected unions, and user groups or their representatives. See Report of the Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation (Docket No. 14650), April 29, 1966, p. 17. At the conclusion of its study the Commission noted in particular that "the aspect of national communications policy which has exerted the greatest long-term structural effect on the industry has been the consistent position of Congress that the nation should not be compelled to rely upon a sole supplier for communications" (p. 212), and that "the desire to maintain an alternative firm in domestic communications places public policy squarely behind Western Union's efforts to diversify, particularly if these efforts are based on efficient performance and an accelerated rate of innovation in new service offerings" (p. 216).

Discussing the role and resources of the Post Office Department in the domestic message communications service, the Report concluded that while it did not seem feasible to transfer telegraph service to the Post Office, a "partial utilization" of

its facilities might offer a "more practical" alternative (p. 299). It was suggested, for example, that since the Post Office's nationwide network of physical facilities was adaptable to the providing of public message service, utilization of these facilities in connection with the delivery phase of Western Union's public message service might stimulate the record communications business (pp. 299-300).

B. The Proceedings Before The Commission.

Pursuant to the Report and in search of ways to promote the public message business, Western Union, with the cooperation of the Post Office, devised the MAILGRAM service which is the subject of this appeal. On November 28, 1969, the carrier filed tariff data and supporting exhibits proposing establishment of a two-year test of MAILGRAM on a narrowly limited basis (A. 3-29 and Supp. A. Tabs A and B). As proposed, MAILGRAM service will utilize a combination of the resources of Western Union and the Post Office in order to provide a deferred or "next day" delivery service. Messages will be received by Western Union for transmission over the company's facilities to a post office located at or near the destination city. The communication will then be handled by the Post Office as first class mail. This system will

permit the offering of a reasonably fast and economically priced service with characteristics that fall between telegraph and postal service offerings. Thus, acceptance and transmission of the message over Western Union lines will give speed of service, although at a higher cost than regular mail. Conversely, local delivery by the Post Office through the mail will defer the speed of service, but the volume operations will permit a lower cost to be associated with this portion of the service as compared to telegrams. This combination of resources will result in a service that will be faster than mail, slower than telegrams, but at a seemingly attractive cost to the user.

Western Union's tariff filing proposes to offer and market test the MAILGRAM service over a two-year period. Only Telex and INFO-COM subscribers in 12 designated cities, using their on-premises equipment, will be able to originate messages.^{4/}

These messages will be routed over Telex and Western Union's Information Services Computer System to a teleprinter station located in the post office serving the destination address. 110 post offices in the 48 contiguous states will have such equipment. Until automatic equipment is designed, postal employees will

^{4/} If MAILGRAM eventually becomes a permanent service, it is anticipated that it will be available to the general public in every city served by Western Union.

remove the messages from the printer, scan them for legibility, envelope the messages, and place the envelopes into the mail system for delivery. Initially, Western Union proposes to pay 25 cents to the Post Office for each message sent, 10 cents for postage and 15 cents for handling. The market test is designed to collect data on several factors, including the extent of the market for the service, customer acceptance, and the effect of MAILGRAM on existing Western Union services such as Telegrams and Overnight Telegrams (Supp. A. Tab B, pp. 8-11).

On December 18, 1969, UTW filed a Petition to Suspend Western Union's tariff (A. 35-54). UTW is a union which represents all but 3000 of Western Union's employees.^{5/} In substance UTW alleged that MAILGRAM represents a fundamental change in national telecommunications policy which can only be effected by Congress, that MAILGRAM is contrary to the public interest in viable and efficient telegraph communication, and that the Post Office does not have the authority to participate in the service. Western Union and UTW then responded to each other's arguments (A. 55-71).

^{5/} The remaining 3000 employees are located in the New York City area. They are represented by the Communications Workers of America. That union expressed its concern about MAILGRAM in a letter to the Commission but did not appeal the decision to test the service (A. 30-32).

The Commission denied UTW's Petition To Suspend in a Memorandum Opinion and Order released January 2, 1970 (A. 72-75). With regard to the nature of the service and the Commission's power to permit it, the Commission stated: "[I]t is manifest that the portion of the service furnished directly by Western Union is a common carrier communication service subject to our jurisdiction. Moreover, it is not unprecedented for a common carrier to furnish service in conjunction with a governmental agency. This is not to say, however, that there may not be practical problems involved in this division of responsibility. This matter will be carefully observed by the Commission. So far as the authority of the Post Office to participate in this service is concerned, we feel that this is a matter for that agency to resolve, and that the Commission should take no position with respect thereto" (A. 73).

The Commission found the various arguments against the tariff put forth by UTW to be "highly speculative." No basis was found for the allegations that the public message service would be impaired or that MAILGRAM would be subsidized by taxpayers. The charge that the service is discriminatory was similarly regarded as insubstantial; and no support was provided for the allegation that the job status of Western Union employees would be jeopardized.

All of these factors may be relevant to the ultimate fate of MAILGRAM, and the Commission stated that detailed reports would be requested from Western Union as the test progressed, but that the actual effects of the service, both good and bad, could best be ascertained through the experience a test can produce. The Commission therefore permitted the tariff schedules to become effective.

Western Union commenced MAILGRAM service on January 1, 1970, pursuant to its tariff. UTW filed a petition for review in this Court on January 7, 1970, and also filed a complaint for a declaratory order and injunction against the Postmaster General and Western Union in the United States District Court for the District of Columbia (Civil Action No. 148-70), in which the principal issue is the authority of the Post Office Department to enter into an arrangement of the kind contemplated by the MAILGRAM tariff.

ARGUMENT

I. PARTICIPATION BY THE POST OFFICE IN THE
EXPERIMENTAL MAILGRAM SERVICE IS NOT
PRECLUDED BY THE COMMUNICATIONS ACT.

The Communications Act confers on the Commission a broad responsibility "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . .," Section 1, 47 U.S.C. 151; United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Commission's authority is commensurate with the scope of its mandate. Section 4(i), 47 U.S.C. 154(i), provides that the agency "may perform any and all acts . . . and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." And Section 4(j), 47 U.S.C. 154(j), authorizes the agency to "conduct its proceedings in such manner as will conduce to the proper dispatch of business and to the ends of justice." Courts have invariably given these provisions a wide and hospitable construction, recognizing that it was not the intent of Congress to "stereotype the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." National Broadcasting

Co. v. United States, 319 U.S. 190, 219 (1943). See also Permian Basin Area Rate Cases, 390 U.S. 747 (1968); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

Though somewhat innovative in nature the MAILGRAM concept was foreshadowed in the 1966 Report of the Telephone and Telegraph Committees, supra, and its relevance to the purposes of the Communications Act is clear. In seeking to have it declared invalid, UTW is urging the same "cramping construction"^{6/} of the Act that the Courts have regularly rejected. In view of the foregoing authorities, we submit that only the most compelling showing that Congress intended to forbid the practice at issue here would warrant striking down the MAILGRAM tariff. Petitioner has made no such showing.

At the outset we stress the limited, experimental nature of the service. It is to be offered only in twelve test cities for a period of two years. The experiment will be closely monitored by Western Union and the Commission and is intended to provide statistical data from which the long-range potential of the service can be assessed and other relevant information

^{6/} National Broadcasting Co. v. United States, supra at 220. See also General Telephone Co. of California v. F.C.C., ___ U.S. App. D.C. ___, 413 F.2d 390, cert. denied 396 U.S. 888 (1969); Buckeye Cablevision, Inc. v. F.C.C., 128 U.S. App. D.C. 262, 387 F.2d 220 (1967); Carter Mountain Transmission Corp. v. F.C.C., 116 U.S. App. D.C. 93, 321 F.2d 359, cert. denied 375 U.S. 951 (1963).

obtained (Supp. A. Tab B, pp. 8-11). Even if it were true, as petitioner argues, that MAILGRAM gives rise to fundamental legal and policy questions, its arguments should be considered in this light. Thus this Court in upholding the Commission's right to authorize subscription television service on an experimental basis placed considerable emphasis on the trial nature of the operation. Connecticut Committee Against Pay TV v. F.C.C., 112 U.S. App. D.C. 248, 301 F.2d 835 (1961), cert. denied 371 U.S. 816 (1962). Later in a case involving rules that would regularize the service, the Court, noting the tentative nature of the earlier authorization, found it "appropriate to give fresh consideration" to the questions presented. National Association of Theatre Owners v. F.C.C., ___ U.S. App. D.C. ___, 421 F.2d 194 (1969), cert. denied ___ U.S. ___ (1970). Though the subject of subscription television involved statutory and policy questions of considerable significance, the Court expressly drew a distinction between an experimental authorization and one which would establish the service on a permanent basis.

Such a distinction may with equal force be drawn here. The Commission has a mandate under Section 218 of the Act, 47 U.S.C. 218, to inform itself of technical advances and improvements in modes of communications so that "the benefits of new inventions

and developments may be made available to the people of the United States." One way to acquire such information is through the kind of experimental offering that is contained in the MAILGRAM service. It goes without saying that the service will not be regularized until any substantial legal or practical difficulties presented at the time a permanent service offering is filed have been carefully considered. Thus, while we do not argue that the case is not final for purposes of judicial review,^{7/} we believe that in considering petitioner's arguments the Court may appropriately note the tentative nature of the challenged service.

In any event, however, it is clear that petitioner has shown no substantial basis for its argument that the Communications Act forecloses the kind of relationship between a privately owned common carrier and a governmental entity that is involved here. Surely the argument that the Act contemplates that carriers will be privately owned rather than governmental entities does not advance its position. The carrier here is Western Union, a private company. Indisputably the service it performs is as the Commission stated (A. 73) "a common carrier service subject to

^{7/} See Isbrandsten Co. v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51 (1954), cert. denied sub nom. Japan-Atlantic and Gulf Conference v. United States, 347 U.S. 990 (1954).

our jurisdiction." That the Post Office Department has contracted with Western Union to undertake final delivery is of no significance insofar as the legality under the Act of the carriage proposed by Western Union is concerned. Interconnection or a joinder of operations between governmental agencies and private carriers is not at all uncommon. For example, the Telegraph Company, as petitioner concedes (Br. p. 27, n. 42), already places telegrams in the mail itself for delivery. Western Union also provides a carrier link in an otherwise governmentally operated communication system between Pasadena, California, and various spacecraft. See California Interstate Telephone Co. v. F.C.C., 117 U.S. App. D.C. 255, 328 F.2d 556 (1964). Likewise, telegrams and telephone calls to Alaska from the 48 contiguous states go through facilities of the Alaska Communications System, an entity operated by the Department of the Air Force, whose lines interconnect with Western Union and American Telephone and Telegraph Co.^{8/}

Nor is there merit to the contention that the Commission improperly held the delivery portion of MAILGRAM not to be a

^{8/} See e.g., Hearings Before Subcommittee 3 of the Committee on Armed Services, House of Representatives, 90th Cong., 1st Sess., on S. 223, p. 5038 (1967).

common carrier service subject to its jurisdiction. That is not what the Commission found. As noted above, it stated that "the portion of the service furnished directly by Western Union is a common carrier communication service subject to our jurisdiction" (A. 73). Although it decided that it would be inappropriate to attempt to determine the scope of the Post Office Department's authority to participate, it plainly did not, as UTW maintains, rule the final delivery stage of the service as outside the area of its concern. On the contrary the Commission made clear at several points in its decision that it would carefully watch to see how the division of responsibilities between Western Union and the Post Office worked out and that if problems arose corrective action would be taken (A. 73 and 75).

For this reason UTW's reliance on 47 U.S.C. 153(a) to show that "services incidental" to the transmission of a "wire communication," such as receipt, forwarding and delivery, are part of the "wire communication" for regulatory purposes is beside the point. By permitting the common carrier to contract for that phase of the "wire communication" to be done by a party other than the common carrier, the Commission did not disavow concern with that aspect of the service. As noted above its decision makes this clear. MAILGRAM service as a whole is a common carrier

never raised this argument before the Commission; therefore it is precluded from doing so now. See 47 U.S.C. 405; California Interstate Telephone Co. v. F.C.C., 117 U.S. App. D.C. 255, 259, 328 F.2d 556, 560 (1964); Albertson v. F.C.C., 100 U.S. App. D.C. 103, 243 F.2d 209 (1957); see also Alaska Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946). In any event the contention is without merit. MAILGRAM does not involve the "construction of a new line." It is simply a new type of service which utilizes existing lines for which Section 214 certificates have long since been issued. Not only does the transmission portion of MAILGRAM require no new construction or installation of facilities, but the service itself is indistinguishable from other services now available on Western Union's existing interstate network. On the message reception end of MAILGRAM, teleprinters will be installed in post offices in cities where Western Union already has facilities. Only a short local line extension will be needed to connect the existing system with the new teleprinters. This is clearly not a new "channel of communication" within the purview of Section 214.^{10/}

^{10/} Even if the minor extension described above arguably fits within Section 214's terms, either of two explicit exceptions to the certification requirement would appear applicable: construction of a "local" line "not exceeding ten miles in length," or "the supplementing of existing facilities." Both of these exceptions are contained in Section 214(a).

What UTW really argues is that the Commission should have held a hearing on Western Union's proposal. As we have shown above, Section 214 is not an appropriate basis for such a proceeding; rather, this is a tariff filing pursuant to Section 203 of the Act. Tariff terms take effect on a date certain unless the Commission orders otherwise. Under Section 204 the Commission is authorized to order a hearing on the "lawfulness" of a new tariff if it thinks that such a course is necessary. It is clear that the decision to hold or not to hold a hearing is one for the Commission's discretion. See Public Utilities Commission of California v. United States, 356 F.2d 236 (C.A. 9), cert. denied 385 U.S. 816 (1966).^{11/} UTW seems to be saying that the Commission abused that discretion here. This argument is based on the allegation that MAILGRAM is a "radical departure" from existing telegraph services. This, however, is not the case. MAILGRAM, as described above, uses existing Western Union facilities to provide on an experimental, trial basis a new service that amounts in essence to a combination of two existing services, the telegram

^{11/} For this reason, among others, the case is quite different from Marine Space Enclosures, Inc. v. F.M.C., Case No. 22,936, decided July 30, 1969, where the Court held that Section 15 of the Shipping Act of 1916 makes a hearing mandatory before approving or disapproving agreements filed with the Commission. In addition, that case, besides raising substantial antitrust questions, centered on a seventy year restriction agreement which had significant impact on maritime commerce (slip opinion, p. 9), quite different from the short term experimental MAILGRAM filing.

and the letter. It combines features of both, with a price falling somewhere in between. To elevate this experimental amalgam of two traditional services to the level of a "radical departure" from existing telegraph services is stretching the facts.^{12/} A hearing based on the alleged special character of MAILGRAM was clearly not warranted. And as shown below, none of the other matters raised by UTW warranted a hearing either.

B. The Effect Of MAILGRAM On Competing Communications Systems Was Not Shown To Be Sufficiently Serious To Warrant A Hearing.

UTW alleges that the Commission failed to adequately consider the effect which MAILGRAM might have on competing services, i.e., telegrams and first class mail. This is contrary to fact. The Commission did refuse to hold a hearing on UTW's bare allegation that the above services would be adversely effected, but this was because no substantial issue had been raised by UTW. As to the effect of MAILGRAM on the telegram service, the Commission observed that "it is not clear" how UTW's allegation of impairment "will come about," and concluded that "UTW offers no specifics which would raise a substantial issue in this respect" (A. 74).

^{12/} Even prior to MAILGRAM, as we have already pointed out, it has been the practice for a telegraph message to be orally delivered over the telephone and then dropped into the mail system for record delivery.

The question of the effect of MAILGRAM on the telegram service is one of the matters which the test is designed to ascertain. Any diversion of traffic can be weighed against the discerned advantages of MAILGRAM. But it has not been shown that a determination can now be made with any degree of accuracy. As for the short-term effects during the two-year test, it should be borne in mind that only the Telex and INFO-COM subscribers in 12 cities can send MAILGRAM messages, so even a substantial pattern of diversion will have little effect on the nationwide telegram service.

So far as the effect of MAILGRAM on the Post Office is concerned, the Commission stated: " . . . material submitted with the tariff indicated that the portion of the charge to the customer which will accrue to the Post Office is designed to fully cover its costs. This is, of course, subject to adjustment with experience and, in any event, we must assume that the Post Office is capable of protecting its fiscal interest" (A. 74). Thus it appears that from a cost standpoint the Post Office is fully protected. There can certainly be no question of diversion from first-class mail since all MAILGRAM messages will enter the mail flow. Any added message volume will actually inure to the Post Office's benefit since it is common knowledge that first-class mail not only pays for itself but also helps subsidize

other classes of mail. The only arguable effect on the Post Office is the use of postal personnel to transfer messages from the teleprinters to envelopes. However, this impact is substantially mitigated since the cost of this personnel use will be covered, the personnel will only be needed until automatic equipment is designed to accomplish the task, and the test is on a quite limited basis. (This aspect of MAILGRAM is discussed in more detail at pp. 35-37, infra.)

C. There Was No Showing That The MAILGRAM Service Discriminates Against Other Carriers.

UTW's next allegation is that the Commission failed to consider that "MAILGRAM might be discriminatory because other carriers had been denied any opportunity for similar relationships with the Post Office" (Br. 45). The Commission stated that no other carrier had indicated that it wished to furnish a similar service (A. 74). It is not as if Western Union, the Post Office and the Commission have kept MAILGRAM a secret up until now. As noted in the Counterstatement, supra, the 1966 Report of the Commission's Telephone and Telegraph Committees in Docket No. 14650 suggested the possibility of a carrier using the Post Office's facilities in the providing of a public message service. During the period immediately preceding Western Union's November 28, 1969, tariff filing, there was no dearth of news

about the proposed arrangement between Western Union and the Post Office. For example, Western Union issued several press releases telling of their plans and the Postmaster General testified in June about the MAILGRAM idea. See Hearings on Postal Reorganization before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess., Tr. 208-209, 230-231 (1969). At no time has any other carrier proposed a similar service or even commented on MAILGRAM. This is true right up to the present time. Thus even assuming UTW is in a position to raise the point, there is plainly no basis for its claim that other carriers have been unfairly deprived of the right to offer a similar service.

D. No Showing Was Made That The MAILGRAM Tariff Would Have An Adverse Effect On Western Union Employees.

UTW's final argument concerns the potential effect of MAILGRAM on Western Union's employees. Its showing before the Commission in this regard was especially barren, consisting of no more than an assertion that their interests are "threatened" (A. 49). In answer to UTW's fears that MAILGRAM will cost employees some jobs, the Commission stated that UTW had not demonstrated "how this result will necessarily follow," and that on the contrary, "to the extent the new service will accomplish its objective of generating new traffic on a profitable basis, the opposite result may ensue" (A. ^{13/}74).

13/ It is interesting to note that the other employee union, the Communications Workers of America, while troubled by certain aspects of MAILGRAM, felt that even a permanent adoption of MAILGRAM would have a "minimal effect" on employment (A. 32).

The Commission promised to closely scrutinize any untoward effects of MAILGRAM and to this end ordered Western Union to comply with reporting requirements to be set up by the Chief of the Commission's Common Carrier Bureau (A. 75). UTW asserts that this is inadequate protection, that MAILGRAM must necessarily result in job losses since delivery will be done by postal employees, and that the Commission's decision is unsupported by the record.

These assertions represent nothing more than an attempt to maintain the status quo on the part of UTW. This is a short-sighted approach. The public message service operated by Western Union has been declining for several years with the result that many public telegraph offices have been closed and employees laid off. MAILGRAM is an attempt to reverse this trend and put some life back into the public message service. Western Union is looking for additional message volume, not the diversion of traffic from one service to another. MAILGRAM has to generate more business from existing customers and new business where none now exists in order for it to be worthwhile. Western Union expects much of the MAILGRAM usage to come from certain users of first-class and air-mail, the incentive being the assurance of next-day delivery. If this expectation materializes, Western Union's employees can only benefit. If the two-year test shows negative results, Western Union is not going to want to continue MAILGRAM

on a permanent basis. Likewise, the Commission will have a voice in this decision, and the test results can then be evaluated. In the short run, the test is so limited that it is hard to see how any employee reduction could possibly result. UTW downgrades the Commission's expressed concern and reporting requirement, but in fact the Commission's language is couched in phrases going beyond the normal supervision of a carrier's business activity.

Finally, the use of postal employees to process and deliver MAILGRAM messages is not a factor bearing on job security for UTW's members. ^{14/} As stated above, traffic diversion is not what is being sought. To the extent the experiment succeeds, new employment opportunities may arise. If the experiment fails, everyone returns to the pre-MAILGRAM state. ^{15/}

In sum, UTW's petition to suspend the tariff was devoid of substantive allegations sufficiently serious to warrant suspension and an evidentiary hearing. Aside from its challenge based on policy grounds (dealt with in Point I and Point III) its argument that the tariff should be suspended consists of nothing more than a curt recital (A. 45-49) of generalized and totally undeveloped complaints directed to the wisdom of establishing the service. The Commission clearly acted well within the range of its permissible discretion when it decided not to suspend the tariff on the basis of so scant a showing.

^{14/} UTW asserts that the taxpayer is bearing the burden of paying for postal employees used to process and deliver MAILGRAM messages. This is completely wrong since the Post Office is being totally reimbursed for its cost. Thus the burden is still being borne by Western Union's customers.

^{15/} The use of postal employees to process the messages will cease as soon as automatic equipment is designed and installed.

III. THE COMMISSION PROPERLY DECLINED TO RULE ON THE QUESTION OF THE POST OFFICE'S AUTHORITY TO PARTICIPATE IN MAILGRAM; IN ANY EVENT, THE POST OFFICE HAS AMPLE AUTHORITY TO SO PARTICIPATE.

One of the principal arguments made by UTW is that the Post Office lacks the statutory authority to participate in MAILGRAM. The Commission did not decide this matter, stating that the Post Office Department should resolve the question of its own authority (A. 73). Presumably, of course, the Post Office had already done so when it entered into the MAILGRAM agreement with Western Union.

Plainly it was neither appropriate nor necessary for the Commission to attempt to decide the extent of the Department's authority. It did not "ignore" the question as petitioner contends (Br. p. 42-43) but decided quite properly that it would accept the determination reached by the Post Office in this regard. This does not represent an abdication of responsibility but is instead an entirely reasonable act of deference to the governmental agency best able to decide the question. UTW has initiated a suit in the United States District Court for the District of Columbia against the Postmaster General (Civil Action No. 148-70) in which it seeks a declaratory ruling that participation by the Post Office in MAILGRAM or a similar service is

unlawful and an injunction against such participation.^{16/} This being the case, and since the issue was not passed on in the order under review, we believe the Court may properly decline to review the question at this time.

We recognize, however, that a decision by the District Court would quite likely be appealed to this Court. Moreover, the fact that the Commission declined to pass on the scope of the Post Office Department's authority would not necessarily inhibit review of the question since construction of the postal statutes, as we have already indicated, is a matter well outside the area of the agency's expertise. See New York State Broadcasters Association v. F.C.C., 414 F.2d 990 (1969), cert. denied ___ U.S. ___ (1970). Accordingly, should the Court find it necessary or desirable to resolve the matter, the United States submits the following discussion of the authority of the Postmaster General to participate in the MAILGRAM service.

A. Summary of Post Office Participation
In MAILGRAM.

For many years the Post Office has provided postal delivery service to telegraph companies. Telegrams reduced to

^{16/} The case is presently being held in abeyance pending the outcome of this proceeding.

written form, sealed in envelopes and bearing the prescribed postage have been and are continuing to be handled by the Post Office as first class mail pursuant to 39 U.S.C. 4251(a) (3). Heretofore, the Post Office employees have physically collected such telegrams from mailboxes or telegraph company facilities, or the companies have physically delivered telegrams to Post Office facilities for mailing. The MAILGRAM service does not propose contraction of this service. Rather, the tariff seeks to test the feasibility of an additional service involving electronic collection of telegraph messages telegraphed by Western Union's Telex and INFO-COM subscribers to receiving teleprinters installed in Post Office facilities. Telex or INFO-COM messages thus collected (i.e., MAILGRAMS) are removed from the teleprinters by Post Office employees and delivered to the addressee via the established Post Office carrier force.

By the terms of the MAILGRAM License agreement with Western Union ^{17/} the Post Office agrees, on a two year experimental basis, to: license Western Union's placement of receiving teleprinters in 110 postal facilities; to assign postal employees to the clerical tasks of periodically removing printed MAILGRAMS from the teleprinters; scanning the MAILGRAMS for legibility;

17/ This document is attached as an appendix to this brief.

inserting and sealing the MAILGRAMS in "window" envelopes; and placing the sealed envelopes in the mail stream for delivery by postal carriers. The License is revocable by either party and does not involve any telegraphic transmission of information by the Post Office.

B. The Explicit Authority Of The Post Office
Department To Engage In Experimental
Mail Service.

The MAILGRAM experiment is part of the research and development program maintained by the Post Office pursuant to 39 U.S.C. 504(a), which provides:

[t]he Postmaster General shall maintain in the Department a research and development program, including investigations and studies for the purpose of introducing or improving equipment, supplies, methods, procedures, means, and devices used in the Department in order that its business may be more efficiently and economically operated.

Within the language of 39 U.S.C. 504(a), the MAILGRAM license seeks to develop empirical data "for the purpose of introducing or improving . . . methods, procedures [or] means . . . used in the Department in order that its business may be more efficiently and economically operated." The "business" of the Department to which the MAILGRAM License is responsive is the delivery of written telegraph messages as first class mail. The MAILGRAM License seeks

to permit an informed determination as to whether the introduction of a procedure for the electronic collection of telegraph messages by the Post Office would, by reduction of physical collection and handling, permit more efficient and economical operation of the receiving aspect of the Post Office's business while, at the same time, providing a record communications service which is more rapid than any current mail service and less expensive than current delivery telegraph service.

The MAILGRAM experiment resulted from consideration by the Federal Communications Commission of the feasibility of some combination of telegraph and postal services^{18/} and a recommendation of the Presidential Task Force on Communications Policy,^{19/} the pertinent portions of which follow (Id. pp. 43-44):

Among the possibilities for strengthening [Public Message Service] perhaps the most promising would involve partial consolidation of telegraphic services with the U. S. Post Office. If the public message service were to have a service counter in all or most local post offices, the cost could be less than Western Union presently incurs in maintaining its own offices. Yet the coverage would be much greater because the number of post offices is more than double the number of telegraph offices. Moreover, consolidation of PMS's messenger crew with the Post Office's much larger force might result in additional savings.

18/ Report of the Telephone and Telegraph Committees of the FCC in the Domestic Telegraph Investigation, Docket No. 14650, April 29, 1966, pp. 297-300.

19/ Final Report, President's Task Force [Rostow Committee] on Communications Policy, December 7, 1968.

We have not attempted to explore the many questions of details that must be resolved prior to even a limited consolidation of postal and telegraph services. We are convinced, however, that it is a realistic and attractive objective whose consideration should be a matter of high priority.

If the public message service cannot be reinvigorated through a cost-reducing consolidation, the abandonment of the service would merit serious consideration * * *

C. The Implicit Authority Of The Post Office Department To Engage In Experimental Mail Service.

Where, as here, there is no Congressional prohibition against the Post Office engaging in the particular experimental postal service, this Court has construed the broad powers vested in the Post Office as encompassing such service. Atchison, Topeka & Santa Fe Ry. Co. v. Summerfield, 128 F. Supp. 266 (D.D.C. 1955), rev'd, 229 F.2d 777, 779-780 (1955), cert. denied 351 U.S. 926 (1956).

In Atchison, a rail mail carrier sought to enjoin an experimental Post Office service permitting air transport of ordinary (i.e., not Air Mail) first-class mail. The District Court recognized "that the general grant of funds to run, maintain and operate the Post Office Department do not negate against the experimental use of some of those funds in an effort to improve the efficiency and economy of the mail" (128 F. Supp. ^{20/} at 269).

20/ Here no direct use of appropriated funds is involved.

The District Court found, under the facts in Atchison, that the experimental service was in conflict with statutes defining Air Mail and held "as a matter of law that the Postmaster General is acting beyond those limits of authority delegated to him" (Id. at 273). Nevertheless, the court concluded:

. . . that as a matter of law, under the grant of moneys to run, maintain and operate the Post Office, the Postmaster General did have the right to experiment, his actions in that sense are not unlawful, but the Court will rule that prolonged experiments which by the running time demonstrate that the knowledge acquired by the experiment has been received and that it is a promulgation of an executive attempt to usurp the power of the legislative function is unlawful.

* * *

The Court will rule as a matter of law that the Postmaster General has a right to make this experiment on the West Coast, limited, as the Court said, in that it shall not be unduly prolonged. (Id. at 273-274).

On cross appeals, this Court concluded that the District Court was in error in failing totally to sustain the Post Office's motion for summary judgment (229 F.2d at 777) and held that "we are unable to find any prohibition of the present experimental program while we do find statutory provisions broad enough to encompass it within their terms" (Id. at 782).

This Court's decision in Atchison establishes that the Post Office's authority to engage in experimental service, prior to the enactment of the specific research and development authority conferred by 39 U.S.C. 504(a), existed in the broad postal powers vested in the Post Office and was not dependent upon specific statutory authorization.

39 U.S.C. 504(a) removes all doubt concerning the existence of experimental authority in the Post Office. However, if 39 U.S.C. 504(a) were disregarded, the MAILGRAM License would constitute a valid exercise of the Post Office's experimental authority as determined by either the District Court or this Court in Atchison. Applying the District Court's rationale, the MAILGRAM License is hardly "unduly protracted."^{21/} The License is limited to a two year test period. Further, the License is limited to service to Western Union's Telex and INFO-COM subscribers rather than the public in general.

Applying this Court's rationale in Atchison, not only is there no statutory prohibition against the Post Office providing the service called for by the MAILGRAM License, there remains in effect the broad postal authority upon which the Atchison decision was predicated (229 F.2d at 779-780).

^{21/} Under the District Court's decision, the experiment would apparently have been unauthorized had it been prolonged to a point tantamount to a permanent program.

Additionally, and apart from 39 U.S.C. 504(a), ample authority exists for each aspect of the Post Office's participation in the MAILGRAM License.

The principal function served by the Post Office under the License is the delivery of MAILGRAMS as first class mail. That the Post Office has clear statutory authority to provide this service is both apparent (see p. 28, supra) and not questioned by appellant (Br. p. 27, n. 42).

Ancillary to the Post Office's mail delivery function under the License is the licensing of space in Post Office facilities for the placement of Western Union's receiving teleprinters and the performance of clerical functions by the Post Office employees, consisting of removal of MAILGRAMS from the teleprinters, scanning them for completeness and placing them in envelopes. The parties to the License contemplate that these manual functions may become mechanized.

Pursuant to the License, MAILGRAMS become part of the mail upon being sealed in envelopes by postal employees (MAILGRAM License, Article 4). MAILGRAMS, as mail, are accepted as first class mail, with the priority handling accorded domestic airmail, upon payment of the postage prescribed by Congress for that postal service (id.).

That the Post Office is authorized to assign its personnel to assist private concerns in order to expedite the movement of mail is implicit in 39 U.S.C. 2203(c) which provides for the crediting to current appropriations of payments made by contractors for services performed for them by postal personnel.

In requesting this legislation, the Post Office explained that "In cases where postal personnel are used to assist contractors in order to keep the mail moving the Department is reimbursed by the contractors for such services and such reimbursement is also placed into revenues which is not available for use by the Department to pay compensation of postal employees" (S. Rept. No. 1538, 87th Cong. 2d Sess. (1962); 1962 U.S. Code Cong. & Adm. News, p. 1743).

In recommending adoption of the proposed legislation, the House and Senate Committees reported that "When postal employees are used to assist railroads in loading and unloading cars, the Department is reimbursed, since the railroad rates include all terminal handling charges. Under the measure, such reimbursement would be credited to the appropriation out of which the salaries are paid, and thus available to pay the cost involved" (H. Rept. No. 858, 87th Cong. 2d Sess. p. 2 (1962); 1962 U.S. Code Cong. & Adm. News, pp. 1741-1742; S. Rept. No. 1538, 87th Cong. 2d Sess (1962)).

Although no statute specifically authorized the assignment of the Post Office employees to assist railroads or other private concerns, neither the House nor the Senate Committees suggested that this fact barred such assignments. Moreover, it should be noted that 39 U.S.C. 2203(c), as enacted, recognizes Post Office assistance to "contractors" generally.

The \$.15 handling fee prescribed by the License ^{22/} for the Post Office services with respect to MAILGRAMS before they become part of the mail is structured to reimburse all Post Office costs for such services in compliance with 39 U.S.C. 2203(c) (2) which provides:

The acceptance, transportation, and delivery of first class mail constitutes a preferred service of the postal establishment and, therefore, the postage for first class mail should be sufficient to cover (A) the entire amount of the expenses allocated to first class mail in accordance with sections 2301-2305 of this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.

The remaining aspect of the Post Office's participation in the MAILGRAM License consists of its licensing Western Union's use of space, in designated postal facilities, for the placement of receiving teleprinters. That the executive agencies have

22/ Article 5.

implied authority to grant revocable licenses for the private use of Government property has long been recognized by the Attorney General of the United States^{23/} and the Comptroller General of the United States.^{24/}

D. The Congress Has Not Expressed A Policy Disapproving Cooperative Service Between Western Union And The Post Office Department.

. Petitioner argues (Br. p. 8 et seq.) that the Congress has articulated a "national telecommunication policy" proscribing all Post Office involvement with telecommunications. Examination of the authorities asserted by petitioner fails to support this argument and establishes that although the Congress has not adopted past Post Office recommendations that the Government own and/or operate a complete telegraph communications system, the Congress has not been requested to approve a postal-telegraph service limited to telegraphic receipt of messages by the Post Office for postal delivery, and no basis exists for assuming that if Congress had been requested to approve telegraphic receipt of messages by the Post Office for postal delivery, it would have denied that approval.

^{23/} 21 Op. Atty. Gen. 473 (1897); 34 Op. Atty. Gen. 302 (1924);
³⁵ Op. Atty. Gen. 485 (1928).
^{24/} 22 Comp. Gen. 563 (1942).

The MAILGRAM License does not contemplate Post Office operation of a telecommunications system (i.e. the capacity to transmit and receive telegraphic messages). MAILGRAM involves only the telegraphic receipt of messages by the Post Office for postal delivery and, as such, differs from long-established postal service to the telegraph companies only in the fact that telegraph messages, as first class mail, would be collected electronically rather than physically.

Petitioner cites no instance where the Congress has considered the limited question of authorizing the Post Office to receive messages by telegraph for postal delivery. Rather, petitioner argues that because Congress has heretofore refused to authorize the Post Office to operate a complete telegraph communications system, Congress must be deemed to have disapproved Post Office utilization of the telegraph to receive mail matter.

Additionally, petitioner infers the existence of Congressional action disapproving the Post Office's telegraphic receipt of matter for postal delivery. In each such instance, petitioner's inference is both misleading and factually unsupportable.

Referring to the "Hubbard proposal" for Government use of private telegraph systems for postal purpose, petitioner

alleges that "This included the selfsame concept embodied in the MAILGRAM service authorized in this case, that is, the delivery of telegrams by mail" (Br. p. 11).

Considerably more was involved in the "Hubbard proposal" than postal delivery of telegrams. The proposal suggested a Government-operated telegraph message service utilizing, by contract, the established facilities of private telegraph companies, to the end that the public would deliver messages to the Post Office for telegraphic transmission via the contract telegraph carrier and ultimate delivery by the Post Office to the addressee. This proposal was described by Mr. Hubbard as follows:

Mr. Hubbard. I favor a system of telegraph in analogy with the other postal service of the country. The Government now contracts with the railroads to transmit its mails, and so it should contract with a telegraph company to transmit the other correspondence.

* * *

The system I advocate is analogous in every respect with the present service of the Postal Department. Telegrams will be carried to the post office as letters are. The letter will be delivered by the post office to the railroad and transmitted by the railroads; the telegrams transmitted to the telegraph company and transmitted by telegraph; and delivered by the Post Office Department; no more employees will be required for the telegram than for the letter. (Hearings on H.R. 3319, H. Comm. on Post Office and Post Roads, 51st Cong. 1st Sess., p. 2 (March 11, 1890))

Quite obviously, the "Hubbard proposal" involved Post Office participation in public message telegraph service to an extent only slightly less pervasive than Government ownership of a complete telegraph communications system, and would have established the Post Office as a major competitor of the private public message telegraph service.

Petitioner next refers to the 1889-1892 postal telegraph proposals of Postmaster General Wanamaker and states that "Most significantly for present purposes, his was one of the historic proposals identical in principle to Mailgram" (Br. p. 13).

That Postmaster General Wanamaker's proposal was anything but "identical in principle to Mailgram," is demonstrated by the opening section of the bill which he submitted to the Congress:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purpose of facilitating the transmission of correspondence among other people and of promoting commerce between the several states, the limited post and telegraph service is hereby established as a bureau or part of the Post Office Department of the United States, and postal telegrams shall be received at post offices, transmitted by telegraph and delivered through the medium of the post office service in the manner herein described. All post offices in places where the free delivery service now exists, or may hereafter be established during the operation of this act, shall be postal-telegraph stations, and the Postmaster General shall from time to time designate as postal stations post offices in other places where, in his judgment, the wants of the public may be supplied under the operations of this act. (Hearings on H.R. 3319, H. Comm. on Post Office and Post Roads, 51st Cong. 1st Sess. p. 5 (February 11, 1890))

The Wanamaker proposal, like the Hubbard proposal, involved the Post Office receipt of public telegraph messages; transmission of those messages via privately owned telegraph facilities; and Post Office delivery of the transmitted messages. Only the latter feature bears any resemblance to MAILGRAM.

Finally, petitioner refers to an 1890 opinion of the Attorney General^{25/} and comments: "The absolute legal necessity of Congressional action was conveyed in an 1890 opinion of the Attorney General, in response to an inquiry from Postmaster General Wanamaker as to his authority to make contracts with telegraph companies for the transmission of messages" (Br. p. 14, emphasis added).

Petitioner's accurate description of the proposed contracts as being for the "transmission of messages" warrants emphasis. Unlike the Wanamaker proposal (p. 40, supra) and the Attorney General's opinion thereon,^{26/} MAILGRAM does not propose Post Office transmission of messages by telegraph.

^{25/} 19 Op. Atty. Gen. 650 (1890).

^{26/} 19 Op. Atty. Gen. 650, 653, 655 (1890).

The Attorney General's 1890 opinion concluded that the Post Office lacked authority, "specifically or by natural inference"^{27/} to establish the postal telegraph system proposed by Postmaster General Wanamaker and that, lacking such authority, establishment of the system violated Section 3732 of the Revised Statutes. Now codified as 41 U.S.C. 11, Section 3732 provides in pertinent part, that:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment . . .

The Attorney General's opinion is clearly inapplicable to the MAILGRAM License for three reasons: (1) the MAILGRAM License is authorized by 39 U.S.C. 504(a) as well as the rationale of this Court's decision in Atchison (supra at pp. 31-32); (2) the MAILGRAM License does not involve any specific expenditure of Government funds - general Post Office appropriations being "adequate to its fulfillment"; and (3) the contract reviewed by the Attorney General contemplated Post Office participation in the receipt, transmission and delivery of public telegraph messages, while MAILGRAM involves no more than Post Office collection and delivery of INFO-COM and Telex messages.

^{27/} 19 Op. Atty. Gen. at 654.

* * * * *

In sum, the Post Office Department's authority to engage in experimental postal service resides specifically in 39 U.S.C. 504(a) and was recognized as being implicit in Title 39, independent of 39 U.S.C. 504(a), by this Court's decision in Atchison, supra. Apart from 39 U.S.C. 504(a) and the rationale of Atchison, the Post Office has authority to engage in each aspect of its participation in the MAILGRAM License. The presence of this authority is dispositive of petitioner's contention that the MAILGRAM License should be declared in violation of a "national telecommunications policy" proscribing all Post Office cooperation with private telegraph companies to effect improved postal delivery of telegraph messages.

The United States is unaware of any authority supporting petitioner's contention that mere Congressional failure to enact a legislative proposal establishes a "national policy" against that proposal. Petitioner not only fails to support the validity of this theory but urges the Court to adopt the far-reaching corollary that mere Congressional failure to adopt a legislative proposal establishes a "national policy" proscribing for all time each component part of the proposal.

CONCLUSION

For the foregoing reasons, the Commission's order should be affirmed.

Respectfully submitted,

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Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

April 17, 1970.

MAILGRAM LICENSE

Made as of the 31st day of December, 1969 by and between The United States of America (herein called "Government") and The Western Union Telegraph Company (herein called "WU").

WHEREAS, the agreement between the parties dated May 8, 1969 provided for the trial of a system for transmitting and delivering messages by means of WU's Telex Network and first class mail; and

WHEREAS, the parties desire to enter into this agreement to permit further experimental operation of such system in the form of the MAILGRAM Service, as the term is hereinafter defined.

NOW, THEREFORE, in consideration of the premises, the parties do hereby agree as follows:

ARTICLE 1. DEFINITIONS AND INCORPORATIONS.

A. Definitions. As used herein the following terms shall have the indicated meanings:

1. Tariff - WU Tariff F.C.C. No. 256 and all revisions, reissues, and replacements of such tariff;
2. MAILGRAM Service - The MAILGRAM Service available to subscribers to WU's communications network as described in the Tariff;
3. MAILGRAM - The message printed out on a teleprinter located in a serving post office and used in the MAILGRAM Service;
4. SPO - Those Government serving post offices listed in Schedule A which shall participate in the operation of the MAILGRAM Service; and
5. Communications Network - The WU facilities used in the operation of MAILGRAM Service as described in the Tariff.

B. Incorporations. The following documents or stated portions thereof are hereby made a part of this agreement with the same force and effect as though fully set forth herein:

1. The document titled Serving Post Offices which is attached hereto and identified as Schedule A.

2. The document titled Equipment and Supplies List which is attached hereto and identified as Schedule B.

3. The document titled Conditions Under Which MAILGRAMS Will Be Spoiled which is attached hereto and identified as Schedule C.

ARTICLE 2. USE OF SPO PREMISES. The Government hereby grants to WU a license to use a portion of the premises of each SPO for the following purposes, and in the following manner:

(1) To install in the SPO's teleprinters and all wiring, cables, and appurtenances necessary to connect the teleprinters to the Communications Network; (2) To place or install and to make the required connections in those instances in which such shall be necessary for proper function, the equipment and supplies to be furnished by WU listed in Schedule B; and (3) To service, maintain, replace, remove, and replenish, when needed, the teleprinters, equipment, and supplies; all for the operation of the MAILGRAM Service.

(2) Visits to SPO's shall be arranged with the local project officer or other official.

A. Locations. The location of such premises in each SPO for the installation or placement of the teleprinters, equipment, and supplies which shall be furnished by WU shall be designated by the Government. Such locations shall have sufficient area, access to necessary utility connections, and adequate lighting to permit proper and efficient performance of the MAILGRAM Service functions provided for in this agreement, as may be mutually agreed upon by the parties.

B. Protection. The Government shall take such reasonable steps as it, in its judgment, deems necessary to prevent access to the teleprinters, equipment, and supplies or the use thereof by persons not engaged in the operation of the MAILGRAM Service.

ARTICLE 3. THE MAILGRAM SERVICE. For the performance of the MAILGRAM Service functions provided for in this agreement, the parties shall furnish the teleprinters, equipment, and supplies and shall perform the services described in this article.

A. Teleprinters. WU shall furnish and install the teleprinters in each SPO and all wiring, cables, and appurtenances necessary to connect the teleprinters to the Communications Network and shall make such connections.

1. The quantity of teleprinters so installed at each SPO shall be such as WU from time to time, shall determine necessary for the MAILGRAM Service, with due regard to the volume of operations at each SPO; provided that at least two teleprinters shall be so installed in each SPO and not more than fourteen teleprinters shall be installed at any SPO except by separate agreement between the parties.

2. The teleprinters shall be capable of receiving and printing out MAILGRAMS and shall be of such type as WU shall determine, from time to time, necessary for the MAILGRAM Service.

B. Equipment and Supplies. Each party, according to the "WU" and "G" (Government) designations appearing opposite each item, shall furnish at each SPO the equipment and supplies listed in Schedule B and shall make any installation or connection of such equipment necessary to its proper functioning.

1. The quantity of such equipment and supplies shall be such as shall be necessary for the proper and efficient operation of the MAILGRAM Service functions provided for in this agreement.

2. Such of the equipment as shall be or become unusable for the purpose intended shall be replaced promptly by the party originally furnishing such equipment. Expendable supplies, as used, shall be replenished and replaced, as shall be appropriate and from time to time, promptly by the party originally furnishing such supplies.

C. Modifications. Any modification to teleprinters and equipment which significantly increases the Government's cost of processing MAILGRAMS, shall be subject to approval by the Government. Consideration shall be given to automating the transfer of MAILGRAMS from the teleprinters to the mail, and the evaluation of the need for and the determination of the procurement of mechanized equipment shall be a joint responsibility of the parties. In the event of such automation, the parties shall negotiate a change in the handling charge to be paid to the Government under ARTICLE 5.

D. SPO Operations. The Government shall perform the following described services at each SPO.

1. Inspect the teleprinters at intervals appropriate to the proper and efficient operation of the MAILGRAM Service at each SPO on each day in which the MAILGRAM Service shall be available as provided in the Tariff, remove from the teleprinters the paper on which the original MAILGRAMS appear, place the MAILGRAMS in envelopes which shall be sealed and placed in the mail.

2. ALL MAILGRAMS received at each SPO prior to cutoff times shall be handled by the Government so as to insure, as far as shall be practicable, their delivery to the addresses on the next post office business day.

a. The cutoff times shall be those times designated by the Government at each SPO by which MAILGRAMS must be received in order to permit delivery to points served by each SPO on the next post office business day.

b. The Government, in timely fashion, shall notify WU of all such changes in such cutoff times.

3. Scan all MAILGRAMS to determine whether each meets the requirements for spoiling as stated in Schedule C. As to all MAILGRAMS meeting these requirements, promptly report such condition to the WU MAILGRAM Service Center, as hereinafter described, via the service telephone, stamp "spoiled" thereon and retain for return to WU, via the means selected by WU at its expense.

4. Report promptly to the WU MAILGRAM Service Center, via the service telephone, all other defects or deficiencies observed in the operation of the teleprinters or in the transmission or reception of MAILGRAMS and of the need for the replacement or repair of equipment.

5. Place and remove as necessary, the paper on which the MAILGRAMS shall be printed on the teleprinters and retain all paper so removed, on which copies of MAILGRAMS shall be printed, for return to WU, via the means selected by WU at its expense.

6. Report promptly via the service telephone, to the designated WU local office or to the WU MAILGRAM Service Center, all instances of the need for replacement or replenishment of the supplies referred to in ARTICLE 3.8.2, at such times as shall provide sufficient lead time for such replacement or replenishment so as to permit uninterrupted MAILGRAM Service availability.

7. The Government shall not be required to accept or deliver any MAILGRAM which is non-mailable under the Federal statutes in effect at the time of transmission or receipt.

E. Support Services

1. WU shall brief and train, from time to time during the term of this agreement, such Government employees as shall be necessary for the performance of the MAILGRAM Service functions provided for in this agreement, including such briefing and training prior to the effective date of this agreement as shall be necessary to permit the operation of the MAILGRAM Service on the said effective date.

2. WU shall provide all preventive and remedial maintenance necessary to keep the teleprinters and WU furnished equipment in good operating condition and shall be solely responsible for the performance thereof.

3. The Government shall provide all preventive and remedial maintenance necessary to keep the Government furnished equipment in good operating condition and shall be solely responsible for the operation thereof.

4. WU shall establish and maintain an attended Service Center for the handling of message, teleprinter, and equipment problems associated with the MAILGRAM Service; such center shall be in operation from 8:00 A.M. to 12:00 Midnight, Eastern Time, on each day on which the MAILGRAM Service shall be available as provided in the Tariff.

a. Operating instructions, containing the information required and the procedures to be followed in the handling of such problems, shall be prepared and agreed to by the parties; such instructions shall be the basis for contacts between the SPO's and the Service Center regarding such problems.

b. Logs of all reports of such problems from the SPO's shall be prepared and maintained by WU and shall identify the reporting SPO and contain the reason for and the disposition of the report; such logs shall be made available to the Government upon request.

5. WU shall bear all costs connected with the operation of the Service telephones.

6. The Government shall bear the cost of electricity consumed in operating the teleprinters and other equipment.

ARTICLE 4. MAIL. The MAILGRAMS shall be considered as mail from the time they are sealed as described in ARTICLE 3.D.1.

As mail, the MAILGRAMS shall be given the priority accorded airmail including, but not limited to, prompt return to the WU MAILGRAM Service Center of all undelivered MAILGRAMS with the reason for non-delivery noted on the envelope.

Nothing in this agreement shall be construed as a representation or guaranty by the Government that MAILGRAMS shall be delivered to the addressees within any particular time.

ARTICLE 5. PAYMENT. For each MAILGRAM placed in the mail, WU will pay to the Government a \$.15 handling charge and the then applicable domestic airmail postage.

A. WU shall deposit with the Government's Post Office Department an amount which shall serve as a postage fund against which the Government shall periodically charge postage for MAILGRAMS placed in the mail. The initial amount shall be \$5,000. Since, by law, postage must be on deposit in advance of usage, the amount and frequency of deposit shall be adjusted on the basis of MAILGRAM Service usage trends to assure prior coverage for the postage for MAILGRAMS placed in the mail. Such fund shall be replenished as necessary and at such periodic intervals so as to maintain a positive balance for the postage charges as they shall be incurred in the next interval.

B. Each month, based on MAILGRAM usage reports from SPO's, the Government shall notify WU of the amounts due for MAILGRAM handling charges. Within ten days of such monthly notification, WU shall pay the Government the total amount due.

C. At the termination of this agreement, the Government shall pay to WU the net amount remaining in the fund after deduction of any postage or handling charges.

D. No payment, for either handling charges or postage, shall be made in connection with any testing of or training for the MAILGRAM Service which the parties may agree shall be performed without charge; in the event either handling charges or postage are paid for testing or training which the parties have agreed shall be performed without charge, all amounts paid therefor shall be refunded, by credit against subsequent amounts due the Government or by payment if such credit is impossible.

ARTICLE 6. SECURITY PROVISIONS.

A. The Government shall not divulge or publish the existence, contents, substance, purport, effect, or meaning of any MAILGRAM except as shall be authorized by the Communication Act of 1934 (47 U.S.C., Sec. 605) and by the laws and regulations of any other governmental unit, whether by legislative enactment, administrative action, or judicial decision, exercising jurisdiction over the MAILGRAM Service. The Government shall maintain in effect and enforce regulations prohibiting such divulgence or publishing by its employees whether before or after the MAILGRAM is placed in the mail. The Government shall not incur any liability as a result of any failure to observe the requirements of this section by its officers, employees, representatives, or agents.

B. The obligations imposed by this article shall survive this agreement.

ARTICLE 7. USE AND REMOVAL. All teleprinters, equipment and supplies furnished by WU pursuant to this agreement shall be used only in connection with the MAILGRAM Service. At the termination of this agreement, WU shall remove all of its teleprinters, equipment and supplies then on hand and its wires, cables, and other

appurtenances used in connecting the teleprinters to the Communications Network and in connecting the equipment and shall restore the SPO locations used in the operation of the MAILGRAM Service, at its sole expense, to as good condition as they were prior to such use, ordinary wear and tear excepted.

ARTICLE 8. INDEMNITY. WU shall indemnify and save harmless the Government and its officers, agents and employees from any and all claims loss, cost, damage or expense (including, but not limited to, claims for property damage, personal injury or death) resulting in whole or in part from the presence of teleprinters in SPO's or growing out of or connected in any other way with the discharge by the Government or WU of any undertaking contained herein whether the same be caused by the negligence of the Government or of its officer agents and employees, or otherwise, provided that the foregoing indemnification shall not apply to any claim arising out of the willful misconduct or intentional wrongful act of the Government or its officers, agents or employees, and shall not apply to any claim arising out of the handling or delivery of MAILGRAMS after the same become mail under the provisions of Article 4 herein. The Government shall give WU prompt written notice of any claim with respect to which the Government claims the right to indemnification pursuant to this paragraph, and WU shall be entitled to participate in the defense of any such claim. Without the written approval of WU first obtained, the Government shall not settle or pay any claim with respect to which it claims the right to indemnification hereunder.

ARTICLE 9. EQUAL OPPORTUNITY. During the performance under this agreement, WU agrees as follows:

A. WU shall not discriminate against any employee or applicant for employment because of race, creed, color, sex, or national origin. WU shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, sex, or national origin. Such action shall include but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. WU shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Government setting forth the provisions of this non-discrimination clause.

B. WU shall, in all solicitations or advertisements for employees placed by or on behalf of WU, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, sex, or national origin.

C. WU shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Government, advising the said labor union or workers representative of WU's commitments under this non-discrimination clause, and under section 202 of

Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

D. WU shall comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

E. WU shall furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the said Secretary of Labor or pursuant thereto, and shall permit access to its books, records and accounts by the Government and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

F. In the event of WU's noncompliance with the nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this agreement may be cancelled, terminated, or suspended in whole or in part and WU may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulations or order of the Secretary of Labor, or as otherwise provided by law.

G. WU shall include the provisions of paragraphs A through G in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions shall be binding upon each subcontractor or vendor. WU shall take such action with respect to any subcontract or purchase order as the Government may direct as a means of enforcing such provisions, including sanctions for non-compliance: Provided, however, that in the event WU becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Government, WU may request the United States to enter into such litigation to protect the interest of the United States.

ARTICLE 10. TERM OF THE AGREEMENT. This agreement shall be and shall remain in effect from January 1, 1970 until December 31, 1971; provided that it may be terminated by either party at any time within such period upon the giving of ninety days prior written notice of such termination to the other party. In the event it is revoked or terminated by the Government, WU shall be given a reasonable time during which to remove its equipment from the SPO's. The Government acknowledges that WU intends to expend effort and incur expenses in reliance upon the license to use the SPO premises granted in ARTICLE 2; because of the foregoing, such license shall not be revoked prior to the termination of this agreement on December 31, 1971, or the

earlier termination of the agreement as provided in sentence of this Article.

ARTICLE 11. ASSIGNMENT. This agreement is for the benefit of the parties only and may not be assigned or transferred without the prior written consent of the other party.

ARTICLE 12. MODIFICATIONS. No modification to the provisions of this agreement shall be valid unless made in writing and signed by duly authorized agents of the parties; and neither the acquiescence in any performance at variance to the provisions of this agreement nor the failure to exercise any right or enforce any obligation hereunder shall be deemed a modification of this agreement.

ARTICLE 13. CONFLICT OF INTEREST. No member of Congress or resident Commissioner shall be admitted to any part of this agreement or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

ARTICLE 14. COVENANT AGAINST CONTINGENT FEES. WU warrants that no person or selling agency has been employed or retained to solicit or secure this agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by WU for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this agreement without liability or in its discretion, to deduct from the consideration, or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE 15. DISPUTES.

A. Except as otherwise provided in this agreement, any dispute concerning a question of fact arising under this agreement which shall not be disposed of by agreement shall be decided by the Contracting Officer, who shall be designated by the Government, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to WU. The decision of the Contracting Officer shall be final and conclusive unless; within thirty days from date of receipt of such copy, WU shall mail or otherwise furnish to the Contracting Officer a written appeal addressed to the Postmaster General. The decision of the Postmaster General or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this agreement as limiting judicial review of any such decision to cases where fraud by such official or his representative or board shall be alleged: PROVIDED, HOWEVER, that any such decision shall be final and conclusive unless the same shall be fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith

or shall not be supported by substantial evidence. In connection with any appeal proceeding under this clause, WU shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, WU shall proceed diligently with the performance of the agreement and in accordance with the Contracting Officer's decision provided such performance shall not violate the Tariff.

B. This Disputes clause shall not preclude consideration of questions of law in connection with decisions provided for in paragraph A above. Nothing in this agreement, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE 16. CERTIFICATION OF NONSEGREGATED FACILITIES. By the execution of this agreement, WU certifies that it does not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. It certifies further that it will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it will not permit its employees to perform their services at any location, under its control, where segregated facilities are maintained. WU agrees that a breach of this certification is a violation of the Equal Opportunity clause in this agreement. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom, or otherwise. WU further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding \$10,000. which are not exempt from the provisions of the Equal Opportunity clause; that it will retain such certifications in its files; and that it will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATION
OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities, as required by the May 9, 1967, order (32 F.R. 7439, May 19, 1967) on Elimination of Segregated Facilities, by the Secretary of Labor, must be submitted prior to the award of a subcontract exceeding \$10,000. which is not exempt from the provisions of the Equal Opportunity clause. The

certification may be submitted, either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

ARTICLE 17. NOTICES. All notices or demands required by this agreement shall be sufficient if delivered personally or mailed, by registered or certified mail with the return receipt requested, to the following individuals:

To the Government - Deputy Assistant Postmaster General
Bureau of Planning and Marketing
Post Office Department
Washington, D. C. 20260

To WU - Mailgram Program Manager
The Western Union Telegraph Company
82 McKee Drive
Mahwah, New Jersey 07430

Further, such individuals shall have authority to agree to changes in the SPO's, in the equipment and supplies, and in the conditions for spoiling MAILGRAMS as set forth in Schedules A, B, and C, respectively. Either party may change the identity of the individuals to receive such notices or demands at any time during this agreement upon fifteen days' prior written notice of such change to the other party.

ARTICLE 18. ADVERTISEMENTS. Each party shall submit to the other party, for approval as to correctness and completeness of content prior to publication, all advertisements of the MAILGRAM Service. Each party shall have ten days in which to approve such advertisements or to deliver to the other party a written statement of those changes necessary for approval; the failure to take such action within the stated time period shall be deemed to be approval of such advertisements.

ARTICLE 19. FUTURE EXPERIMENTATION. It is the intent of the Government and WU to experiment with expedited postal delivery services should they become available; in such event, the terms upon which such services shall be utilized shall be negotiated by the parties.

ARTICLE 20. EXECUTION. This agreement may be executed in two counterparts, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties have caused this document to be executed on the date first above written.

THE WESTERN UNION TELEGRAPH COMPANY

By _____

W I T N E S S :

Typed Name _____

Title _____

Date _____

THE UNITED STATES OF AMERICA

By _____

Typed Name _____

W I T N E S S :

Title _____

Date _____

SPO

Albuquerque, NM

Albany, NY

Alliance, NB

Alexandria, LA

Amarillo, TX

Atlanta, GA

Baltimore, MD

Binghamton, NY

Birmingham, AL

Billings, MT

Brainerd, MN

Boise, ID

Boston, MA

Buffalo, NY

Cedar Rapids, IA

Main Post Office
Chicago, IL

North Suburban.
Chicago, IL

South Suburban
Chicago, IL

Charlotte, NC

Cheyenne, WY

Charleston, WV - 13,

Camden, NJ

Columbus, OH

Concord, NH

Dallas, TX

Detroit, MI

Des Moines, IA

Denver, CO

El Paso, TX

Eugene, OR

Fargo, ND

SCF Northern,

Fort Worth, TX

Greensboro, NC

Great Falls, MT

Hays, KS

Harrisburg, PA

Houston, TX

Indianapolis, IN

Iron Mountain,

Janestown, ND

Jackson, MS

Kansas City, MO

Little Rock, AR

Los Angeles, CA

Lansing, MI

Las Vegas, NV

Louisville, KY

Mankato, MN

Mobile, AL

Macon, GA

Memphis, TN

Montgomery, AL

Miami, FL

Milwaukee, WI

Minneapolis, MN

Nashville, TN

New Orleans, LA

North Platte, NB

New Haven, CT

Newark, NJ

General Post Office
New York, NY

Grand Central Station
New York, NY

Church Street Station
New York, NY

Oakland, CA

Oklahoma City

Omaha, NB

Orlando, FL

Pittsburgh, P

Philadelphia,

Phoenix, AZ

Pierre, SD

Pocatello, ID

Portland, ME

Pasco, WA

Portage, WI

Portland, OR

Providence, RI

Rapid City, SD

Richmond, VA

Reno, NV

Roanoke, VA

Rocky Mount, NC

Sacramento, CA

Savannah, GA

Scranton, PA

Seattle, WA

Sioux Falls, SD

San Francisco, CA
Springfield, IL
Salt Lake City, UT
San Antonio, TX
Sioux City, IA
Spokane, WA
Springfield, MA
Saint Louis, MO
Syracuse, NY
Tacoma, WA
Tallahassee, FL
Tulsa, OK
White River Junction, VT
Wichita, KS
Wilmington, DE
Washington, D. C.

EQUIPMENT AND SUPPLIES LIST

Equipment

Supplied By

WU	Cutting-folding templates
G	Distribution case
WU	Western Union telephone & Lock and Key (service telephone)
G	Work table
WU	Paper collectors for teleprinters
WU	Time & Date stamp

Supplies

WU	Extra rolls of Mailgram paper
WU	Spare ribbons for teleprinters
G	Extra ink for stamp pad
WU	Mailgram envelopes
	Rubber hand stamps
WU	1. Mahwah address
G	2. Region address
G	3. POD address
WU	4. "Spoiled"
	Instruction cards:
WU	1. Changing paper
WU	2. Changing ribbons
WU	3. Servicing procedures
G	4. Wastebasket
WU	5. Ink pad for hand stamps
G	6. Calendar
WU	7. Mailgram terminal Handbooks (2)
WU	8. Cutting- folding template
WU	Stamped envelopes for return of spoiled MAILGRAMS
WU	Envelope moistener

SCHEDULE B

CONDITIONS UNDER WHICH MAILGRAMS WILL BE SPOILED

The following are the conditions for which each MAILGRAM will be scanned:

1. The phrase "bust this";
2. No signature;
3. Obviously distorted format;
4. Garbled or illegible copy;
5. No addressee; and,
6. No zip code.

All MAILGRAMS with any of the foregoing conditions shall be spoiled.

SCHEDULE C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents

THE WESTERN UNION TELEGRAPH COMPANY,
Intervenor

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER

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United States Court of Appeals
for the District of Columbia Circuit

FILED 1 1970

William J. G. G. G. G.
CLERK



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23852

UNITED TELEGRAPH WORKERS, AFL-CIO,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

THE WESTERN UNION TELEGRAPH COMPANY,
Intervenor

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER

In our principal Brief ("Pet. Br."), we relied on (1) the long-established national telecommunications policy set against Post Office participation in the telegraphic communications process, and in accordance with that policy, (2) the provisions of the Communications Act of 1934 ("Act") and (3) the Congressional circumscription of the Post Office to "postal" communications, and (4) other errors made by the Respondent Federal Communications Commission ("FCC") in its Memorandum Opinion and Order in this case.^{1/} The factual foundation and legal analysis upon which we

^{1/} FCC Commissioner Johnson's Statement, concurring in part and dissenting in part, issued on April 13, 1970, is set out in the Addendum to this Brief, infra. Commissioner Johnson felt
(continued p. 2)

relied are not directly or effectively answered by either the Respondents in their Brief ("Res. Br.") or the Intervenor ("Int. Br."), and our position is thereby actually strengthened by those Briefs.

I. THE NATIONAL TELECOMMUNICATIONS POLICY DELIBERATELY ADOPTED AND CONSISTENTLY FOLLOWED BY THE CONGRESS PRECLUDES ANY SUCH JOINT TELEGRAM-MAIL SERVICE AS MAILGRAM.

Analyzing the entire history of telegraphic communications in this country, we demonstrated in our principal Brief that Congress had deliberately established and consistently followed a policy throughout that history -- and obviously intended all Government agencies having anything to do with electronic communications to follow and implement that policy -- of confining the day-to-day administration and operation of the telegraph service in this country to private operation, excluding therefrom the Post Office Department. Certainly that policy required that Congress itself knowledgeably consider and expressly approve any such unprecedented intermixture of traditionally postal with traditionally telegraph, any such "new message transmittal service" (Res. Br. 2; emphasis added throughout), as is before the Court in this case. Respondents seek to avoid both the history and its significance, contending that (1) there is no meaningful similarity between Mailgram and

(continued from p. 1)
that the FCC had not "sufficiently answered the Union's objections * * * [or] detailed exactly the relationship between the telegraph service and the postal service. What impact will this have upon the nation's telegraph service?" (Add. 1 - Add. 2, infra).

the historical proposals for Post Office participation in the telegraph which Congress deliberately and consistently rejected, and (2) whatever Congress did, it established no national telecommunications policy which is of concern herein. Respondents lose even the Intervenor on the latter contention; the Intervenor, which does contest the history, does not deny the dispositive legal force of the national telecommunications policy if we were correct as to the historical facts.

A. Mailgram Is Similar In Principle To The Hubbard And Wanamaker Proposals, And Is Embraced By The National Telecommunications Policy.

In attacking the significance of the history set out in our principal Brief, Respondents concentrated their fire on the Hubbard and Wanamaker proposals which were so vigorously debated by the public and the Congress in the 1870-1890 period. Respondents contend that those proposals are dissimilar from Mailgram because they would have allowed the Post Office Department to operate a "complete telegraph communications system" (Res. Br. 38). In historical truth, however, that characterization was employed by the opponents of the proposals in seeking to discredit them, while both Mr. Hubbard and Postmaster General Wanamaker made clear that they were not espousing complete Post Office operation but were, rather, advocating participation by the Post Office Department in the day-to-day operation of a private telegram system, analytically the identical kind of proposal embodied in Mailgram.

As Mr. Hubbard made very clear in the testimony immediately following that which is set out on page 39 of Respondents' Brief, the persons who would operate the telegraph wires under his plan would be employees of the telegraph company.^{2/} In addition, Mr. Hubbard emphasized in that hearing that "the Government shall [not] invest a single dollar in lines or operators or instruments."^{3/} It certainly was generally understood then, and is clear now to those who will cast an impartial eye on the history, that telegraph transmission under the Hubbard plan, as under the Mailgram service, was to be performed by a privately owned and operated telegraph company.^{4/}

Similarly, the Wanamaker proposals were characterized by opponents in its own day as constituting a Government telegraph. It is true, as we pointed out (Pet. Br. 12), that Postmaster General Wanamaker would have preferred a completely Government telegraph; and at early hearings, he discussed at least two variations of his more limited plan: one which would have in fact given the Post Office an operational role in transmission as well as delivery, and another which would have made the Post Office merely a delivery agent and would have left with the Telegraph Company the traditiona

^{2/} Hearings on H.R. 3319, H. Comm. on Post Offices and Post Roads, 51st Cong., 1st Sess., 2 (March, 1890).

^{3/} Id. at 16.

^{4/} Wells, The Relation of the Government to the Telegraph, 8-10 (1873).

role of transmission.^{5/} In any event, because of the challenge of his critics, Wanamaker, in his Report for 1890, refined his proposal and made clear that:

"The contracting telegraph company would furnish lines, instruments, and operators, and transmit the messages at rates fixed by the Government, all of which would go to the Company except two cents per message, which would be retained by the Post Office Department to cover its expense in collecting and distributing."^{6/}

Moreover, the Wanamaker proposal was subsequently understood and distinguished from other proposals by virtue of the fact that it contemplated a dual operation -- that is, operation of the wire services by the Telegraph Company and delivery of messages by the Post Office.^{7/}

Accordingly, the Hubbard and Wanamaker proposals were identical in principle to Mailgram in providing for telegraph transmission by a private company, and in establishing and limiting the operational role of the Post Office Department primarily to delivery. Indeed, there is the further remarkable identity that Postmaster General Wanamaker himself supported his proposal as an

^{5/} Hearings on H.R. 3319, H. Comm. on Post Office and Post Roads, 51st Cong., 1st Sess., 21 (Feb., 1890).

^{6/} Government Ownership of Electric Means of Communication, Sen. Doc. 399, 63rd Cong., 2nd Sess. (App. A, pp. 18 et seq. "Historical Resume of Agitation for Government Ownership of the Telegraph and Telephone of the United States"), 26 (1914).

^{7/} Id. at 31-32.

experiment from which a more concrete proposal could be made at a later time.^{8/} The significant difference which does exist between Postmaster General Wanamaker's proposal and Mailgram is that he recognized that any such experiment raised policy issues requiring Congressional consideration and approval, whereas in Mailgram, the Telegraph Company and the Post Office are seeking to arrogate this power for themselves. Obviously, Respondents have succeeded only in adding emphasis to the identity in legal principle, as they are unable to distinguish the historical precedents from Mailgram.

Respondents' discussion of the Opinion of the Attorney General (19 Op. Atty. Gen. 650 (1890)) likewise only confirms the validity of Petitioner's reliance thereon. Respondents' characterization of the Opinion as confined to the power of the Post Office to transmit telegraph messages is wholly without foundation (Res. Br. 41). For the Opinion itself states the question presented as the power of the Post Office "to make contracts with telegraph companies for the transmission of messages after the manner in which contracts are now made by the Department with transportation companies for carrying the mails" (19 Op. Atty. Gen. at 650), obviously denoting that private companies would perform the service of transmission of telegraph messages. In any event, the Opinion makes it crystal clear that it would be unauthorized "to provide for and take charge of a portion of the telegraphic service and

^{8/} Hearings on H.R. 3319, H. Comm. on Post Office and Post Roads, 51st Cong., 1st Sess., 14 (Feb., 1890). ("We cannot tell until the experiment is made just what is possible").

make the same an adjunct of the postal service under a contract" (id. at 655). In other words, the Opinion confirms our position that (1) a contract with a telegraph company whereby it transmits messages under a joint program with the Post Office is illegal and (2) the delegation of a portion of telegraph service to the Post Office is in any event illegal.

Significantly, Respondents almost entirely ignore the important events occurring since 1900 in the implementation of the national telecommunications policy. The wisdom of the decision to do this is demonstrated by the Intervenor's attempt to derogate that period. All the Intervenor can do with the Report of the Postmaster General made after his control and supervision of the telegraph companies during World War I (Pet. Br. 15-16), for example, is to derogate his comments as "made in passing" (Int. Br. 56). In truth, however, the Postmaster General emphasized the seriousness which he ascribed to that Report by referring to it in his Report for the fiscal year ended June 30, 1919, reiterating his conviction that there should be, inter alia, "consolidation of offices and utilization of Post Office buildings where practicable [for telegraphic and telephone purposes]".^{9/} To be sure, the Postmaster General would have preferred a more expansive Government role at that time, but a fair reading of his annual Report as well as his Report on his experience during World War I demonstrates that he was proposing in a concrete fashion a role for the Government in the telegraph operations.

^{9/} Government Control and Operation of Telegraph, Telephone and Main Cable Systems, August 1, 1918 to July 31, 1919, 99 (G.P.O. 1921).

Nor is there any basis for minimizing the significance of the history and legislative direction found in the Communications Act of 1934. After all, Congress was undertaking what it considered to be a massive overhaul of the communications regulations and was charting a course of communications policy for many years to come. In that context, its adoption of a recommendation not to include operational participation by the Government in public message service is highly significant.

Further, despite the cavalier dismissal of the 1943 history of the merger legislation (Int. Br. 57-58), the hard fact remains that Congress had squarely presented to it the issue of public versus private telegraph operation, and its decision was unequivocally against Government operation. It is in that context also that we must view the decision by the Post Office and the Congress not to implement even the partial role for the Government suggested by Secretary of Commerce Jones (see Pet. Br. 20-21).

Moreover, there is no basis for the contention (Int. Br. 59) that the 1966 Report of the Telephone and Telegraph Committees of the FCC in the Domestic Telegraph Investigation, Docket No. 14650 emphasizes the "irrelevance of the elaborate history" which we set forth in our principal Brief. If anything, that Report made it very clear that transferring of message service to the public sector was among the "drastic solutions" (id. at 279), and it nowhere appears that they were suggesting an experiment without proper legislative authorization. The Report showed that the Committee was aware of the struggle by the Postmasters General to

obtain by way of legislation some kind of Government role in the operation of the telegraph (id. at 297, n. 56).

In any event, the FCC itself, as a Commission, did nothing about these recommendations. It is not Commission action. Respondents' consistent characterizations of the Report as "Commission" action (Res. Br. 3, 4, 30) is a misrepresentation. Whether ingenuous or ingenious, cf. Aaron v. Cooper, 358 U.S. 1 (1958), it suggests the lengths to which Respondents feel they must go to defend this particular FCC Order.

Additionally, the Final Report of the President's Task Force on Communications Policy (1968), relied upon by Respondents (Res. Br. 40-41), made it clear that in proposing a joint Post Office-telegraph service, they had not "attempted to explore the many questions of detail that must be resolved prior to even a limited consolidation of postal and telegraph services" (Ch. 6 at 43). And it is particularly significant that the Task Force which made the recommendation had been given the specific task "to determine if the Communications Act of 1934 and the Communications Satellite Act of 1962 require a revision" (id. at 1). It was in addressing themselves to that directive manifestly predicated on amendment of the Act that the Task Force entertained the thought of a joint telegraph-mail service to the public.

In sum, American and Congressional history do indeed demonstrate that there is a national telecommunications policy, and that it permits of no Government participation in the offering of telegraph message service to the public without express Congressional authorization.

B. The National Telecommunications Policy Has
Dispositive Effect Here.

Respondents but not Intervenor contend that the consistent and well-defined Congressional policy, if it exists, somehow bears less legal force because Congress has expressed it by refusing to accede to requests for legislation made by the Postmasters General and distinguished members of the public and the Congress for over 100 years. This has not been, as Respondents contend (Res. Br. 43), a "mere Congressional failure to enact a legislative proposal", but a deliberate and repeated rejection by Congress of numerous legislative proposals, on the basis of a consistent policy that telegraph communications in this country shall be administered by private enterprise and not by public agency. The binding effect of that policy has been recognized, inter alia, by Postmaster General Wanamaker himself (Pet. Br. 12), the Acting Attorney General in his 1890 Opinion (id. at 14), a member of Congress writing about the United States postal policy in 1931 (id. at 10), the Congressional Reports and debates in 1942-1943 (id. at 19-21), and in more recent settings. For the deliberations dealing with satellite communications during 1960-1962, culminating in the creation of a private, profit-oriented, satellite corporation under the Communications Satellite Act of 1962 (47 U.S.C. §701 et seq.), reaffirm that not only Congress and the Executive Branch, but also the FCC and Western Union, all understood and acknowledged the existence and

pervasive force of that policy.^{10/} Furthermore, not only has there been a consistent and explicit Congressional refusal to accede to repeated requests, but there also has been a consistent administrative interpretation under which neither the Post Office nor the FCC has ever undertaken or sanctioned any such joint venture, notwithstanding the fact that the idea is at least a century old and has been repeatedly espoused -- to Congress -- by Government officials.

^{10/} One of the most important policy issues presented by satellite communications was, of course, public versus private ownership of the satellite corporation. Chairman Minow of the FCC acknowledged that satellite communication "though a new technology, is essentially but another means of relaying long distance communications. It will perform much the same function as do existing cable and radio facilities of our common carriers." Hearings, H. Comm. on Interstate and Foreign Commerce, Communications Satellites - Part 2, 87th Cong., 2nd Sess., 402 (1962). Thus, while the FCC agreed that satellite communication presented policy factors requiring new legislation and a single corporation, Chairman Minow emphasized that "our studies * * * have convinced us that the necessary decisions can and should be made within the context of our traditional philosophy under which telecommunication facilities of this Nation are owned and operated by regulated private enterprise" (id. at 401). Commissioner Craven testified that space communications systems "will and should take their place within the framework of our free enterprise system, under which public communications facilities are owned and operated by private companies subject to Government Regulation." H. Rept. No. 1279, 87th Cong., 1st Sess., 23-24 (1961). President Kennedy, in recommending private ownership, noted that "[t]hroughout our history this country's national communication systems have been privately owned and operated, subject to governmental regulation of rates and service." H. Rept. No. 1636, 87th Cong., 2nd Sess., 17 (1962). For its part, Western Union objected to even partial Government ownership of the satellite corporation, stating, inter alia, that "communications in the United States have traditionally been furnished by private enterprise * * * ." Hearings, H. Comm. on Science and Astronautics, Communications Satellites - Part 2, 87th Cong., 1st Sess., 880 (1961).

Accordingly, the canon of statutory interpretation most persuasive in the premises is the following, in the words of Mr. Justice Frankfurter, speaking for the Court in FTC v. Bunte Bros., 312 U.S. 349, 352 (1941):

"Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. Just as established practice may shed light on the extent of power conveyed by general statutory language so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred * * * . This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over the transactions [such as those presented in this case]."

See also, Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 509-512 (1949); Afroyim v. Rusk, 387 U.S. 253, 256-262 (1967); Textile and Apparel Group, etc. v. FTC, --- U.S.App.D.C. ---, 410 F.2d 1052, 1056-1057 (1969), cert. denied, 396 U.S. 910 (1969).^{11/}

Finally, as we demonstrated in Part II of our principal Brief, and as we shall demonstrate further in Part II of this Reply, the Act itself reaffirms and demands adherence to the policy of

^{11/} Of course, there must be distinguished from the present context cases where an administrative agency seeks only confirmation or clarification of its authority; in such a context, Congressional failure to act on administrative requests may be inconclusive as to the authority of the agency. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 169-173 (1968). In this case, the repeated requests to Congress that it grant the Post Office an operational role in the telegraph have always been understood -- heretofore -- as being absolutely required by policy and law. There is nothing ambiguous or inconclusive about the historical materials.

of which Respondents are assertedly "unaware." Thus, there is abundant authority for sustaining and applying the historical imperative which has been set forth by Petitioner and consistently -- prior to Mailgram -- acknowledged and respected by both the FCC and the Intervenor.

II. THE PROVISIONS OF THE ACT DO NOT CONTEMPLATE OR PERMIT ANY SUCH JOINDER OF TELECOMMUNICATIONS AND POST OFFICE OPERATIONS AS MAILGRAM.

In our principal Brief (Pet. Br. 22-26), we demonstrated that the Act, reflecting the historical imperative of separation of postal and telegraph operation, assumed and directed -- contrary to Mailgram -- that (1) communication by wire would be furnished to the public by and through private "common carriers" only, (2) Government agencies in general and the Post Office Department in particular were not "common carriers" within the meaning of the Act, (3) the phase of the service approved for the Post Office Department in the Order below fell squarely within the statutory definition of "communication by wire", and (4) in sum, the Act did not permit the FCC to approve or Western Union to furnish to the public communication by wire in conjunction with the Post Office Department.

Respondents concede that we are correct as to (2) and (3) i.e., that the Post Office is not a "common carrier" under the Act, and is executing a phase of common carrier wire service (Res. Br. 15-16). This concession is in effect a confession of error as to the holding below that only "the portion of the service furnished directly by Western Union is a common carrier service subject to our

jurisdiction", signifying that the Post Office portion is not (App. 73).^{12/} This concession alone requires the setting aside of this FCC Order, in the absence of any suggestion or authority to the effect that the FCC may by its own fiat delegate or abnegate the jurisdiction established by the Congress.

Respondents dispute (1) and (4) above, contending that the Act permits public wire service to be performed apparently by any person or entity, "so long as the common carrier is the offering party" (Res. Br. 16), and that therefore the Post Office Department can execute a phase of wire communication without doing violence to the Act. Respondents fail, however, to discuss any

^{12/} The Intervenor disagrees with Respondent on this point and takes the position that the Post Office is not performing a telegraphic function but rather is performing solely a postal function (Int. Br. 27-28). But the fact that the very essence of Mailgram service is Post Office involvement in receiving messages transmitted electronically by wire and delivering them to the addressee demonstrates that the entire Mailgram service falls within the statutory definition of "wire communication", precisely as Respondents concede.

The Intervenor seeks nonetheless to salvage its position by asserting that in fact the FCC Order "does not authorize or sanction Post Office participation in Mailgram nor does it provide that Mailgram service is to go forward, irrespective of the Post Office's authority in the matter" (Int. Br. 33). That assertion is plainly at odds with the regulations approved by the Commission which among other things commit the Post Office to participation in the service (Reg. 5.2.1., App. 16), to returning to Western Union incorrectly addressed or undeliverable telegrams so that they can be returned to the sender (Regs. 5.2.2 - 5.2.3, App. 16). And lest there be any doubt as to the effect a tariff is supposed to have: "it is the law." Carter v. American Telephone and Telegraph Co., 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). We agree that the Commission had no authority to approve these regulations which purport to bind the Post Office, and in so doing it acted well beyond its jurisdiction.

(continued p. 15)

portion of the Act which supports this "declaration" of what the law is on these points. That failure can best be explained, we submit, by the fact that the Act, its history and underlying policy all squarely refute Respondents' position.

A. The Act Does Not Permit Execution Of Common Carrier Wire Service By The Post Office Department.

As we demonstrated in our principal Brief, the Act quite clearly directs that wire service be furnished by a "carrier"; and in the case of a joint or through wire service (such as Mailgram), only in conjunction with another "carrier" within the Act, subject to FCC regulation and process. That proposition is supported not only by the express language of §201 of the Act, but flows inescapably from the entire structure of Title II and the Congressional purpose to vest in the FCC effective and complete regulation of all carriers and each and every step of the process of furnishing wire communication.^{13/}

(continued from p. 14)

The Intervenor also seeks to disparage the manifestly substantial work functions of Post Office employees in Mailgram, by asserting that they "anticipate" (Int. Br. 4, 28) or "contemplate" (Res. Br. 34) that some of the functions may be mechanized. The record references of Intervenor are to its own Reply below and to material which makes no such statement; Respondents candidly have no record references for their ipse dixit. In fact, there is no way to conceal or minimize the substantial handling of telegrams required of Post Office employees (rather than Telegraph Company employees) in Mailgram.

^{13/} Pet. Br. at 23, and n. 37; H. Rept. No. 1850, 73rd Cong., 2nd Sess., 2 (1934); Hearings on S. 2910, S. Comm. on Interstate Commerce, 73rd Cong., 2nd Sess., 32 (1934) (Statement of Frank McManamy, Chairman, Legislation Committee of the ICC); Scripps-Howard v. FCC, 316 U.S. 4, 6, 7 (1942); United States v. American Telephone and Telegraph Co., 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd, 325 U.S. 837 (1945).

Under Respondents' argument, the Congressional direction and design reflected in Title II of the Act is simply abrogated; for the FCC would be wholly excluded from regulatory authority over a portion of "communication by wire" otherwise within its jurisdiction, and that authority would be vested exclusively in the Post Office Department, the very agency which Congress specifically stripped of any authority in the telegraph field (Pet. Br. 29). Indeed, if Respondents' position is correct, it should follow logically that if Western Union "offers" a service under which it has contracted with the Post Office Department to operate the major portion of its service, or even the whole of it, the Act would not thereby be offended, and the FCC would be without power even to consider the legality of the contract.^{14/} Moreover, Respondents would presumably continue to deny that any national telecommunications policy exists which would in any way be undermined.

Respondents seek to rescue themselves from the implications of their far-reaching argument, by suggesting that the FCC

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While Respondents' assertion is that "services incidental" to transmission can be performed by the Post Office under an offering by a carrier, there is no distinction under the Act between "transmission" and "services incidental" to transmission; both alike are embraced by the statutory phrase and concept, "wire communication"; there are no different provisions for different phases of the process. In logic, Respondents' position that one phase of communication by wire ("services incidental") can be delegated to the Post Office means nothing less than that the Post Office may perform "wire communication" in its entirety or in any of its phases without involving the FCC.

may exhibit a quantum of "concern" as a substitute for actual regulation. Accordingly, but without being able to specify precisely what they mean, they assert that even though the FCC has no jurisdiction over the party performing the wire service, nonetheless, "it looks to its own carriers to see that the quality and other aspects of the service are effectively maintained" (Res. Br. 16, n 9), and that the FCC in the Order below "plainly did not * * * rule the final delivery stage of the service as outside the area of its concern," but, they say, "made it clear * * * that it would carefully watch to see how the division of responsibility between Western Union and the Post Office worked out and if problems arose, corrective action would be taken * * *" (Res. Br. 15). In the first place, however, the Act was not intended merely to delineate an "area of * * * concern"; it conferred a jurisdiction to regulate which the FCC may not delegate or repeal. Further, the FCC did in fact rule out as a matter of law any meaningful concern for the delivery phase of the service, even to the extent of holding that the Post Office portion of the service was not part of common carrier wire service. As if to underscore its lack of concern in this regard, the FCC also approved Regulation 5.4.2(B) (App. 18), which completely exempts Western Union itself from any legal responsibility for the non-delivery or negligent delivery of Mailgrams. Respondents have now repudiated the position that delivery is not part of the common carrier service (Res. Br. 14-15), but they still concede and insist that the FCC is without power to regulate the Post Office's operations of that part of the service. Since

regulation of the Post Office Department, and hence its operation of the service, is beyond the jurisdiction of the FCC, presumably only the Post Office can take corrective action with respect to that phase, and the FCC may not, and will not, interfere.

In short, when the Post Office performs the delivery portion of Mailgram, the FCC's jurisdiction and its legal concern end when the Post Office receives the message over the teleprinter, a result directly in conflict with the language and purpose of the Act directing that the FCC regulate the carriers and service completely and effectively.

Nor do Respondents' list of alleged "precedents" (Res. Br. 14-16) for joint carrier-Government service legitimize the ruling below. In the first place, no effort is made by Respondents to explain the legal basis upon which these "precedents" have been permitted -- if in fact a legal determination has ever been made in connection with them.

In any event, Respondents have demonstrated more fully in their reliance upon the contractual arrangements described (but not ruled upon) in California Interstate Telephone Co. v. FCC, 117 U.S.App.D.C. 255, 328 F.2d 556 (1964), the nature of the error below and the weakness of their position here. For unlike Mailgram, which effects a joint operation by Post Office and common carrier for the providing of a complete common carrier service to a third party customer, the role of Western Union in a project such as that in the California Interstate Telephone case was to build and operate a communications system for its customer, Jet Propulsion Laboratories (a Government contractor operating a NASA facility) for the customer's

own use. But here the Government admittedly does not occupy the status of the customer (as to which we assume, arguendo, that the Act does not prohibit all Government activity), but is concededly acting as carrier for Western Union's customers -- a function it cannot perform under the Act, because it is not, by FCC concession, a carrier, nor is it subject to any FCC process or regulation.^{15/}

^{15/} Respondents' other examples of their bare conclusions that a non-regulated Government carrier may perform common carrier service in conjunction with a carrier are no better (Res. Br. 14-16). In the first place, the mailing of a telegram after it has been communicated to the addressee is not part of the communication process, but it is simply a courtesy of verification after the fact which may or may not be desired by the addressee. Secondly, without giving us the benefit of any rulings or analysis, Respondents tell us that carriers perform services in conjunction with foreign, Government-owned, message carriers in other countries. In order for that example to be at all helpful or meaningful in the present case, we would have to know the basis upon which the conjunction was allowed, whether there were any applicable treaties or international agreements, and whether the Commission has in fact addressed itself in that field to the implications under the Act of the union. It could be, for example, that those joint services involved satellite communications, as to which Congress has explicitly authorized the operation of service "with foreign governments", 47 U.S.C. §735. Thus, while that situation is obviously distinguishable, it is no answer to our arguments based on the Act that the Order below is lawful merely because other carriers have filed tariffs for service in connection with Government-owned message companies, foreign or otherwise, unless some analysis or explanation of the legality under the Act is furnished.

Equally inapposite, and for the same reasons discussed in the text, are Intervenor's examples of wholly intra-Government telecommunications systems. Moreover, with respect to the establishment of the position of Director of Telecommunications Management, to which Intervenor attaches great significance (Int. Br. 31), it is important to note that the Executive Order establishing that office (27 Fed.Reg. 1519 (1962)) relies upon §§305 and 606 of the Communications Act of 1934, for its substantive authority, thus confirming Petitioner's argument that the role for Government in telecommunications is derived from exceptions in the Act itself. Additionally, in the House Report (H. Rept. 91-930, 91st Cong., 2nd Sess. (1970)) approving Reorganization Plan No. 1 of 1970 (Int. Br. 31 at n. 22),

And we must emphasize that the California Interstate case did not squarely decide a question of the legality of a joint Government-Western Union service of any kind. (See 117 U.S.App.D.C. at 258, 328 F.2d at 559).

B. The Order Below Cannot Be Sustained On The Theory That This Is Only An Experiment.

The short answer to Respondents' notions that labeling Mailgram "experimental" makes it legal is that when Congress has declared that an agency has no jurisdiction, asserting jurisdiction over less than all of the forbidden area is the identical kind of a legal arrogation and usurpation of the Congressional function as asserting jurisdiction over the entirety of the forbidden area. It was the first bite of the apple that violated the commandment.

There is nothing about the claimed "experiment" which serves to legitimize Mailgram. If Mailgram is not authorized under the Act as a permanent service, it is identically not authorized as a temporary service. There is nothing about the Act which requires

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the Committee noted that "Regulation of our Nation's commercial telecommunications service lies primarily with the Federal Communications Commission, but the responsibility for meeting the Government's own requirements in this field have been placed largely in the hands of the President" (id. at 3).

Similarly, the arrangements heretofore made by carriers with the Government-owned Alaska Communications System (Res. Br. 14) do not serve as any useful precedent for Mailgram. As is shown in the very source cited by Respondents (Hearings on S. 223, H. Comm. on Armed Services, Subcomm. 3, 90th Cong., 1st Sess., 5038 (1967)), such arrangements are specifically authorized by statute (Act of May 26, 1900, 31 Stat. 206 and 55 Stat. 190 (1941); see 48 U.S.C. §§310, 311). Moreover, Congress has now authorized the sale of the Alaska Communications System to private interests (40 U.S.C. §§771, et seq.), thereby expressing its agreement that "the time has come * * * that the military should no longer do that which private enterprise does elsewhere." Hearings on S. 223, supra, at 5026 (Senator Bartlett).

that an excess by the FCC extend to every village hamlet before it is recognized and scotched. The Act is not "suspended" merely by calling a service "experimental"; indeed, Western Union has proceeded in accordance with specific provisions of the Act itself, and has not claimed that the offering is outside of the statute.^{16/}

In any event, the fact is that the Order below itself rests on a holding that Mailgram is permissible as a matter of law. The FCC Order did not take the position which Respondents now take (Pet. Br. 34-35).

^{16/} Thus, Connecticut Committee Against Pay TV v. FCC, 112 U.S. App. D.C. 248, 301 F.2d 835 (1962), cert. denied, 371 U.S. 816 (1962), relied upon by Respondents (Res. Br. 12), is distinguishable because it dealt, inter alia, with a provision in Title III of the Act (with respect to radio regulation) directing the Commission to provide for experimental uses of frequencies (47 U.S.C. §303(g)), and the Court there addressed itself primarily to the question of whether the experiment was in the "public interest". The basic question as to subscription services themselves had been ruled upon and approved in analogous contexts. Id. at n. 2, 250, 837. Here the Commission did not purport to be implementing any authority in Title II to provide for experimentation in telegraph service, but rather purported to be determining the legality of the service under the substantive provisions of the Act. Nor has this proposal even been remotely approved by any Court. Similarly, inapposite are the cases relied upon by Intervenor (Int. Br. 15-17) exalting the value of collecting empirical data. Petitioner has no quarrel with the value of empirical data -- indeed we urged the Commission to make a record and to study empirical facts before it made a decision in this case -- but those cases and those principles are of no avail unless the experimentation itself has a basis in law. This asserted "experiment" has no basis in law and cannot be sustained on a vague notion of the value of helpfulness of experimentation.

It follows that this Court must measure the propriety of the approval of Mailgram against the standards of the Act as written -- precisely as it did in the analogous situation presented in Atchison, Topeka and Santa Fe Ry. v. Summerfield, 97 U.S.App. D.C. 203, 229 F.2d 777 (1955), cert. denied, 351 U.S. 926 (1956) (discussed more fully, infra, pp. 22-24). The Act precludes such a Post Office-Telegraph Company joint venture as Mailgram.

III. POST OFFICE PARTICIPATION IN MAILGRAM IS NOT AUTHORIZED BY THE POSTAL LAWS OF THE UNITED STATES AND MAILGRAM IS THEREFORE UNLAWFUL.

A. The Atchison Case Does Not Support The Contention That The Postmaster General Has Authority Under 39 U.S.C. §504, Or Inherently Under The Postal Laws, To Participate In Mailgram.

Respondents' attack upon the proof that Post Office participation in Mailgram is illegal under the postal laws (Pet. Br. 30-36) rests primarily upon the assumption that this Court's decision in Atchison, Topeka and Santa Fe Ry. v. Summerfield, 97 U.S.App.D.C. 203, 229 F.2d 777 (1955), cert. denied, 351 U.S. 926 (1956), lends some support to the proposition that the Post Office had inherent authority, even "prior to the enactment of the specific research and development authority conferred by 39 U.S.C. 504(a)" to engage in projects such as this, so that subsequent to the enactment of that provision, such authority exists a fortiori and must extend to participation in Mailgram (Res. Br. 33). That position misstates both the rationale of Atchison and the purpose of §504(a); and in any event, disregards the fundamental distinction between Post Office activities directed toward improving the transportation and movement of the mails, and Post Office operation of a phase of telegraph message service.

While this Court in Atchison did uphold the experiment by the Postmaster General of sending regular mail via air transportation, the Court did not rely upon any authority, explicit or implicit, of the Postmaster to conduct research. Contrary to Respondents' assertion, there was explicit research authority, for the authority now conferred by 39 U.S.C. §504(a) had been enacted in 1949, prior to Atchison.^{17/} But the Court did not rely upon that provision or any implicit administrative authority to conduct research. Instead, this Court was concerned with the substantive provisions of the statute itself. The Court's holding was that under the substantive provisions of the law, the Postmaster could send regular mail by air without offending the statutory provisions with respect to Air Mail. In support of its interpretation of the statute, the Court noted that Congress had approved the Postmaster's actions in an appropriation bill, and declared that "under the circumstances we think the indications of implied legislative approval are entitled to weight." 97 U.S.App.D.C. at 208, 229 F.2d at 782. Atchison, therefore, stands squarely for the proposition that even in experiments in which only transportation of the mails are concerned, the Court will be concerned first and foremost with determining whether the Postmaster General has complied with the substantive provisions of the postal laws. Accordingly, Atchison supports Petitioner's thesis that Mailgram cannot be authorized

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63 Stat. 608 (1949), 39 U.S.C. (1952 Ed.) §§847, 847a. This predecessor statute contains minor differences in text not relevant here.

on an experimental basis if it cannot pass the test of legality under the explicit standards of the Act.

B. The Postmaster's Authority To Participate In Mailgram Is Refuted By Consistent Administrative Practice.

Neither §504 nor any inherent authority of the Postmaster could possibly apply here in any event, because of the obvious impact of 120 years of Congressional unwillingness to permit any Post Office participation in public telegraph service. In addition, the Postmaster has had explicit authority to conduct research and development for over 20 years, and has never before violated the long-standing Congressional policy against participation in the operation of the nation's telegraph service. Such continued Post Office abstention is especially noteworthy because the Post Office has considered and experimented with electronic transmission of messages within the Government, and even that program was stopped because "the experimental program threatened competition with private business".^{18/} Moreover, participation in Mailgram obviously marks a significant break with 120 years of Post Office policy and at least 20 years of prior administrative practice under §504. In such circumstances "[f]ailure to use such an important power for so long a time indicates * * * that the [Postmaster] did not believe the power existed." FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513 (1949) (ten-year practice).^{19/}

^{18/} 1961 Annual Report of Postmaster General, VIII, 32 (1961).

^{19/} This long-established practice is hardly refuted by the fact that neither the Postmaster General nor whatever Congressmen were present thought it necessary to mention it when the Postmaster General, in the course of testimony on the vast subject
(continued on p. 25)

C. There Is No Authority In Title 39 For Allowing
Postal Employees To Assist Private Companies In Executing
Their Business.

Reference to authority of the Postmaster to permit Post Office personnel to assist in loading mail onto trains, or assisting Post Office contractors in moving the mails (Res. Br. 34-36; Int. Br. 38-39), is utterly irrelevant to any issue about moving telegrams. Moreover, Respondents and the Intervenor themselves acknowledge that there is statutory ratification and authorization under the postal laws for this Post Office practice (39 U.S.C. §2203(c)). Respondents and the Intervenor see no difference between the use of Post Office personnel and resources in accordance with the postal laws to move the mail, in the public interest, and the diversion of Post Office personnel and resources in excess of the postal laws to move telegrams in the private interest, and hopefully to the private profit, of the Telegraph Company. But there is a difference, precisely the difference between the Government's hiring a privately owned truck to move the mails (and helping the trucker get that job done) and the Intervenor's hiring a mail truck to move the products of its own private business.

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of postal reform and only a few days after the new Postal Reform Bill had been sent up by the President, made some passing references to the prior stage of Mailgram, which involved only "test" or dummy messages (Supp. App., Tab A, 9) and not live messages (Int. Br. 48-49; Res. Br. 23); the Postmaster General did not make clear that the service was to be offered without his seeking legislative approval therefor.

D. The Mailgram "License" Is Not Properly Before
The Court.

There is no basis upon which Respondents (Res. Br. 28-37) may discuss or treat in any fashion the "license" agreement between Western Union and the Post Office Department. That license, which is undated in the form presented in the addendum to Respondents' Brief, was actually executed on January 9, 1970, ten days after the FCC adopted its Order, and thus was not before the agency when it made its decision. Attached hereto in the Addendum is the executed final page, which Respondents did not present to the Court (Compare Add. 6, infra, with Res. Br. App. 12).

If it has any significance, Respondents' attempt to bring the license before the Court at this stage demonstrates that the FCC should have considered the license prior to rendering its decision below. Its failure to consider this document now thought so relevant as to be tendered to the Court dehors the record is sufficient basis, apart from the manifold additional considerations militating for that conclusion, for setting the Order aside.^{20/}

^{20/} Authorities cited by Respondents (Res. Br. 36-37, and nn. 23-24) assertedly supporting the proposition that an executive agency has general authority to grant a license for private use of Government property are irrelevant here for they have nothing to do with the right of a Government agency -- or the Post Office in particular -- to license the use of its space as part of Government participation (not just private use) in the licensee's FCC-regulated efforts vis-a-vis the public. Indeed, as far as we know, the most recent effort on the part of the Government to bring about the use of Post Office space for telegraph purposes was made in 1943 (Pet. Br. 20), as a suggestion for legislation, and still has not received legislative approval. Moreover, one of the cited authorities,

(continued on p. 27)

IV. ASSUMING ARGUENDO THAT SOME CONJUNCTION OF TELEGRAPH AND POSTAL OPERATIONS SUCH AS MAILGRAM IS AUTHORIZED AND PERMISSIBLE, THE ORDER BELOW MUST BE SET ASIDE FOR FAILURE OF THE FCC TO COMPLY WITH THE PROCEDURES AND STANDARDS OF THE ACT, GIVE ADEQUATE CONSIDERATION TO PERTINENT ISSUES, HAVE ADEQUATE FOUNDATION IN RECORD FACT FOR ITS FINDINGS, OR EXPRESS EITHER ITS FINDINGS OF FACT OR ITS CONCLUSIONS OF LAW WITH SUFFICIENT SUPPORT, PRECISION OR CLARITY.

A. The FCC In Effect Issued A Certificate Of Public Convenience And Necessity Without Complying With The Act, Particularly §214.

Both Respondents and Intervenor contend that Petitioner is precluded from raising before this Court the error of the Commission with respect to its failure to follow the procedures of §214 for failure to raise the point at the administrative level (Res. Br. 17-18; Int. Br. 18-19). That technical plea must be rejected because it misconstrues the Petitioner's contentions below and, further, because it seeks to immunize from review and correction by this Court a plain violation by the FCC of its powers and duties under the Act.

1. The applicability of the licensing requirements of §214 were adequately raised below.

At the outset, we must keep in mind the important distinction under the Act between a tariff which sets out "charges * * * classifications, practices, and regulations affecting such

(continued from p. 26)

34 Op. Atty. Gen. 302 (1924), did not deal directly with this question, and another, 21 Op. Atty. Gen. 473 (1897), was later supplemented, id. at 476, to make clear that the authority to license derived from a specific statutory grant, id. at 478.

charges", and a certificate of convenience and necessity authorizing operation of a "new line". In the tariff situation, a carrier is prescribing the charges and other conditions to be applicable to an established type of service, and it is permitted to implement them without advance FCC approval. Public Utilities Com'n of State of Cal. v. United States, 356 F.2d 236 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966). "On the other hand, in the "new line" (i.e., a new "channel of communication") situation, the carrier may not lawfully proceed without a certificate of "convenience and necessity"; should it do so, the FCC has the power and the duty to order the carrier to cease and desist operation of the new service unless and until the FCC grants a certificate therefor in compliance with §214. Gen. Tel. Co. of California v. FCC, --- U.S.App.D.C. ---, 413 F.2d 390 (1969), cert. denied, 396 U.S. 888 (1969).

In the light of this fundamental and well-understood dichotomy between the two statutory situations and procedures, it is an exercise in sterile technicality to suggest that Petitioner did not adequately put the FCC on notice that §214, and its mandatory pre-implementation licensing requirements, were directly in issue in the objections against Mailgram which Petitioner filed with the FCC. For Petitioner repeatedly emphasized that neither the Commission nor Western Union could proceed in this case under the ordinary tariff procedures, but in fact were required, if Mailgram were indeed within FCC jurisdiction altogether, to treat Mailgram as requiring -- not merely permitting -- FCC authorization prior to its implementation.

Large certificate of necessity

Accordingly, §214 was thus clearly invoked in substance, although it concededly was not invoked by the numbers.^{21/}

2. The FCC's failure to proceed with Mailgram in accordance with §214 is plain error.

Even assuming, arguendo only, that Petitioner did not adequately raise below the applicability of §214, Respondents' assertion that the FCC need not have complied with that Section in this case cannot be sustained inasmuch as the carrier was expressly proposing to undertake a brand new kind of service. General Telephone Company of California v. FCC, supra. The ultimate interest to be secured is the public interest and the FCC cannot escape its own manifest failure to protect the public interest pursuant to §214, by pleading a failure on the part of Petitioner to raise the point in the ritualistically correct manner. Surely a reviewing Court "in the public interest and to guard against injustice, may, of its own motion, notice errors which have not been preserved for review, if

^{21/}

While the Petition to Suspend (App. 33-54) rested primarily on the position that the entire matter was beyond FCC jurisdiction, it did specify serious factual problems which required a hearing prior to the issuance of permission for the service. Moreover, after the issues were more clearly defined by the Reply of the Company, Petitioner made very clear in its Responding Memorandum (App. 66-71) that "there is a serious question whether [Mailgram] can appropriately be dealt with in the form of a tariff transmittal" (App. 66); and further stated, "there is serious question whether the Commission may lend its imprimatur of approval to this new system either by refusing to suspend it or in any other way. The fact remains that §201 and the entire Act delineate what a common carrier like the Company may do, including interconnections with other carriers, on and only after Commission approval" (App. 67). Additionally, Petitioner stated, "By adopting the guise of a tariff submission, the Company is seeking to avoid a hearing and such thorough Commission consideration as would attend a frank

(continued on p. 30)

such errors are obvious, or if they otherwise seriously affect the fairness and integrity of the judicial proceedings." United States v. 353 Cases, etc., 247 F.2d 473, 477 (8th Cir. 1957), later opinion 256 F.2d 89 (1958), cert. denied, 358 U.S. 834 (1958).^{22/}

3. The exceptions in §214(a) are inapplicable to Mailgram.

Respondents contend that the implementation of the service would involve the construction of a "local" line "not exceeding ten miles in length" or the "supplementing of existing facilities," which, they say, are exceptions to §214(a) licensing requirements (Res. Br. 18, n. 10; see Int. Br. 19-20). But there is no evidence in the record to support the assertion of either proposition as a fact. Furthermore, even assuming that these circumstances could be proved and were of record, implementation of a new kind of service, such as Mailgram, would require a certificate regardless of distance or amount of construction. General Telephone Company of California v. FCC, supra.

(continued from p. 29)
avowal that it is engaged in embarking upon a brand new service, without any consideration from the viewpoint of the public as to the convenience and necessity in justification of the service or as to the impact upon historic national telecommunications policy of segregation of telegraph and postal services" (App. 70).

^{22/} Furthermore, the alleged failure of Petitioner to adequately raise this issue is clearly not a jurisdictional bar to review. Hormel v. Helvering, 312 U.S. 552, 556-557 (1941). And where, as here, the proceedings were informal -- indeed practically non-existent -- review of the plain error below is clearly appropriate. Cf. Quick v. Martin, 130 U.S.App.D.C. 83, 85, 397 F.2d 644, 646 (1968).

Moreover, it is hardly realistic or accurate to suggest that the new lines involved in Mailgram constitute construction of a "local line" or consist merely of the "supplementing of existing facilities." In fact, Mailgram is an entirely new "channel of communication" within the meaning of §214, extending throughout the entire continental United States. In effect, the Respondents and Intervenor, by focusing solely on the physical construction aspect, are asking this Court to ignore the rejection by Congress of the concept that a "new line" for purposes of §214 be limited to construction of new physical wires and poles (Pet. Br. 38, n. 45). Congress required a certificate of convenience and necessity for any new "channel of communication" and Mailgram certainly falls within that category.^{23/}

^{23/} Even if §214 is laid to one side and it be assumed arguendo that Mailgram could be treated by the FCC as involving nothing more than a tariff submission, the FCC's failure to hold a full hearing would still be clear error. The Order below decides that Mailgram is lawful; Respondents (and Intervenor by implication) concede that the Order below is a final one (Res. Br. 13; Int. Br. 2, 8). Under §204 of the Act, however, a determination of lawfulness may not be made without a full hearing prior thereto. Section 204 declares that it is only "after full hearing [that] the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective [to determine lawfulness]." In other words, the FCC could not have been required to consider the lawfulness of the tariff prior to implementation. Public Utilities Com'n of State of Cal. v. United States, 356 F.2d 236 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966). But inasmuch as the FCC did on its own initiative undertake to determine the issue of the lawfulness of Mailgram, it was legally required to conduct a genuine hearing which would satisfy the statutory standard.

B. The FCC's Failure To Consider Whether Mailgram Violated The Postal Laws Requires That This Order Be Set Aside.

Respondents simply attempt to create facts with their pens as their only defense to the demonstration that the FCC's failure to consider whether Mailgram violated the postal laws requires the setting aside of the Order below (Pet. Br. 42-43). Respondents assert the FCC accepted "the determination reached by the Post Office in this regard" (Res. Br. 26). There is not the slightest support in the record -- and, of course, Respondents cite none -- for any implication that the Post Office had at the time of the Order below, or has ever for that matter, considered whether it could lawfully engage in Mailgram, let alone lawfully reach a "determination" thereon; or that the FCC had at the time of the Order below, or has ever for that matter, requested, let alone received or considered, any expression from the Post Office whether by determination, opinion or other sign as to Mailgram, as to legality or any question. In capsule, the record refutes Respondents and supports Petitioner's statement that the FCC ignored the question of the legality of the Post Office participation in Mailgram.

C. The FCC Erred In Not Holding A Hearing And Developing A Record On The Public Interest Questions Raised By Petitioner.

The various public interest factors raised by Petitioner before the Commission are being treated by the Respondents (Res. Br. 20-35) and the Intervenor (Int. Br. 20-26) in the same fashion as the FCC treated them below, that is, they assume with a priori

wisdom that no proofs can be adduced to counter their assumptions and that therefore notwithstanding the serious implications of the points raised, this Court should summarily affirm the FCC action. Suffice it to say that such a cavalier approach to the legal requirements that an administrative agency both have and articulate sound reasons for its treatment of the issues and its ultimate conclusions should not find acceptance at the agency level, and certainly not on judicial review. As Commissioner Johnson has pointed out, the FCC's "refusal [to deal with Petitioner's objections] is an admission that it is not able to handle such serious, technical objections as those raised. For to answer the objections would require a far greater understanding of the industries we are charged to regulate than we currently possess" (Add. 5, infra).^{24/}

^{24/} The Intervenor raises as its last and evidently least point a contention it did not raise below, that Petitioner does not have adequate standing in this Court (Int. Br. 59-61). Intervenor actually seeks to deprive Petitioner of standing to petition for review of the FCC decision by stating that the FCC decided the job security and financial interests of Petitioner's members would not be impaired in the next two years. Such a position is untenable as a matter of common sense, and is certainly not the law. See, e.g., Association of Data Processing Service Organizations v. Camp, 90 S. Ct. 827 (March 3, 1970). The realities of Petitioner's standing are revealed by the fact that both the Intervenor and the FCC answered Petitioner on the merits. No question of standing appeared. It would be the extreme of injustice to accept Intervenor's suggestion that, although Petitioner had such standing before the FCC that it is bound by the FCC Order on the merits, it may not seek review of that adverse FCC ruling in this Court.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, this FCC Order should be set aside and the relief specified in the Brief for Petitioner decreed.

Respectfully submitted,

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[In the Matter of Petition by the United Telegraph Workers Union for Suspension and Investigation of the Proposed MAILGRAM Service Offering of the Western Union Telegraph Company].

Statement of Commissioner Nicholas Johnson,
Concurring in Part, Dissenting in Part

Western Union has proposed the instigation of a new communications service, MAILGRAM, in which the telegraph message will be delivered to the receiver through the mail. Presently, telegrams are delivered by messenger or telephone. To the extent that this new service--to be offered on an experimental basis for two years--provides lower costs and better service to the consumer, I concur in the Commission's action. It is imperative that our country's communications service be responsive to consumer demands and always innovative. I am hopeful that this service will in a small way improve the communications system of the nation.

Although I welcome this experiment by Western Union, I am troubled by some objections raised by the United Telegraph Workers Union. They have raised serious and thoughtful questions about the operation of this new service. I do not feel that we have sufficiently answered the Union's objections. For example, we have not adequately dealt with the question of whether we have jurisdiction over this "quasi"-common carrier service. We have not detailed exactly the

relationship between the telegraph service and the postal service.

What impact will this have upon the nation's telegraph service?

The Union--obviously an informed source--tells us that service

will be impaired. Who will bear the costs of delivering the "mailgram"--

the users of the postal system or the users of the telegraph service?

Will postal charges for this service cover their costs? What provisions

for privacy will exist against the random "snoopings" we are now

experiencing by the Post Office? What effect will this decision have

upon our ability to regulate the incidental aspects of this service?

And finally, what impact will this new service have upon jobs in the telegraph industry?

I have written often about this Commission's inability to engage in long-range planning. In the allocation of the radio spectrum, in the regulation of new telecommunications systems, and, in fact, in the interplay between regulation and any technological change, we have proven ourselves inadequate managers of the nation's resources. Due to lack of staff, lack of resources, and lack of initiative, we are unable to project the economic consequences of our decision to allow Western Union to engage in this new service. We have no statistics or cost figures which allow us to assess the impact of our decision upon the postal system. Perhaps we should even allow more services to be borne by the Post Office. But within the present framework of regulation, we do not, and cannot, know.

Add. -3-

I think this Commission also has some substantial obligation to inform the public what measure of privacy and confidentiality the Post Office will give this new "mailgram" service. Under the proposed system, telegrams will be sent to the Post Office in the city of destination, a postal employee will remove the telegram from the teleprinter, place it in an envelope, and mail it to the addressee. Governmental officials will therefore have easy access to the contents of "mailgram" communications--to read or copy them. Yet this Commission has not, to my knowledge, inquired whether the entire process could be automated so as to insure that no one will be able to read the mailgrams sent. Nor have we adequately informed ourselves of what regulations and procedures the Post Office will use to guarantee "privacy" to the users of this service.

Richard Harwood has recently reported in the Washington Post (April 8, 1970, p. A-19) that the Post Office and Treasury Departments have proposed a rule which would permit them to open and inspect any letter or package mailed from abroad for "prohibited or dutiable matter," including alleged pornography and lottery materials. Harwood also discovered that the Post Office has, for years, regularly refused to deliver letters written by American citizens to foreigners suspected of "prohibited" activities. We have also learned that Presidential assistants

have been given the authority to search through income tax returns; that the Justice Department has been subpoenaing reporters' notes and records for years; and the FBI and police departments all over the country routinely tap telephones and eavesdrop in homes and offices, provided some court approves.

It does not appear to me that either the Post Office or the Government itself has much regard or respect for freedom and privacy in this country. Justice Brandeis in Olmstead v. United States, 277 U. S. 438, 478 (1928), eloquently summarized the principles underlying the Constitution's guarantees of privacy:

The makers of the Constitution. . .knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. " (Emphasis added.)

Section 605 of the Communications Act gives the Commission the clear authority to insure that the contents of messages transmitted by wire shall remain confidential. I am reluctant, therefore, to sanction this potentially valuable new "mailgram" service without ~~furter~~ assurance from the Post Office that they will adopt specific measures to safeguard the confidentiality of the mails.

I concur in the implementation of this experimental new service, but feel I must dissent to the Commission's refusal to deal more

Add.-5-

completely with the objections raised by the Telegraph Workers Union. I feel that the objectors, as well as the rest of the nation, should know that the Commission's refusal is an admission that it is not able to handle such serious, technical objections as those raised. For to answer the objections would require a far greater understanding of the industries we are charged to regulate than we currently possess.

Add. 6

IN WITNESS WHEREOF, the parties have caused this document to be executed on the date first above written.

THE WESTERN UNION TELEGRAPH COMPANY

By *John M. Evans*

WITNESS:

Typed Name John M. Evans

Title Vice President & General Counsel

Date _____

THE UNITED STATES OF AMERICA

By *Harold F. Faught*

Typed Name Harold F. Faught

Title Assistant Postmaster General
Bureau of Research and Engineering

WITNESS:

Date January 9, 1970

